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PRACTICED MORAL ACTIVISM

PAUL R. TREMBLAY*

I. INTRODUCTION

Readers of legal ethics literature frequently encounter the following question: "Can a good lawyer be a good person?"¹ This Article addresses a variation of that question: "Can a good lawyer be a good person if that person is not a good philosopher?"² This new question confronts a perplexing realization about most moral exploration of lawyering—that it takes place amidst a language and an intellectual world with which most practicing lawyers are not familiar or conversant. Of course, the philosophers³ inhabiting that world and using that language aim to affect the lives of working attorneys in some concrete way, but reading the philosophers does not self-evidently show how their world connects to the world of practice. This article expresses that

* Associate Clinical Professor, Boston College Law School. Several colleagues have been kind enough to read earlier drafts of this work, and I have benefited from their comments. I thank Mark Aaronson, Reed Loder, Peter Margulies, Avi Soifer, and Mark Spiegel for their reactions, and Johann Lee for his able research assistance. Finally, I thank Dean Avi Soifer and Boston College Law School for financial support.

1. Originally in Charles Fried, *Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976), and most recently in Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1272 (1994), but most of the articles I discuss under the rubric of "morally activist lawyering" address that question, either explicitly or implicitly. That question serves as the unifying theme for one of the most important collections of essays in this area. See DAVID LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 38-39 (1983) [hereinafter LUBAN, *THE GOOD LAWYER*]. Leslie Griffin refers to it as the "Rorschach test for contemporary legal ethics." Leslie Griffin, *The Lawyer's Dirty Hands*, 8 GEO. J. LEGAL ETHICS 219, 233 (1995).

2. The philosopher Alasdair MacIntyre has addressed a comparable question about "plain persons" and moral philosophy. See Alasdair MacIntyre, *Plain Persons and Moral Philosophy: Rules, Virtues and Goods*, LXVI AM. CATH. PHIL. Q. 3 (1992) (concluding that ordinary persons and philosophers address inseparable questions). See also Alasdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 PHILOSOPHIC EXCHANGE 37, 40 (1978) [hereinafter MacIntyre, *What Has Ethics to Learn*] ("Medical men and women have as much chance of not being philosophers as M. Jourdain had of not speaking prose.").

3. I term "philosophers" those scholars who rigorously explore or critique the moral dimension of law practice and legal institutions, applying in their exploration or critique the arguments and constructs of moral philosophy. Some of the scholars whom I fit into this category are philosophers by profession, for example, David Luban, Gerald Postema, Virginia Held, Alasdair MacIntyre, Alan Goldman, and Susan Wolf; others are law professors who fit my definition of philosopher, such as William Simon, Stephen Ellmann, Stephen Pepper, Deborah Rhode, Gerald López, Rob Atkinson, Thomas Shaffer and Robert Gordon. Still others may be both philosophers and lawyers, such as Richard Wasserstrom, Reed Loder, David Wasserman, M.B.E. Smith and Charles Fried. For my purposes here, they are all functionally philosophers.

connection.

The disjunction between the experts and theorists on the one hand and the practitioners on the other is a common observation of late.⁴ Whether or not that complaint is sustainable generally, it has notable relevance to the recent intense inquiry about the moral justification of the lawyering role. The question of whether lawyers are morally justified in fulfilling their traditional roles has been a dominant focus of legal ethics over the past twenty years.⁵ Progressive writers have challenged that justification, suggesting a "morally activist"⁶ posture to contrast with the idea of "neutral partisanship,"⁷ often called the "standard conception" of the lawyer's role.⁸ The progressives' moral activism demands accountability from lawyers for their actions. The standard conception, by contrast, relieves lawyers of any moral accountability so long as lawyers do not violate the law for their clients. The

4. Judge Harry Edwards has complained that most academic scholarship produced in recent years is of little use to practicing lawyers or sitting judges. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35, 42-57 (1992). Whatever one thinks of Edwards' controversial critique, and it has been challenged on many fronts (see, e.g., Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075 (1993); Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945 (1993)), he is correct that much law faculty production has drifted away from doctrinal analysis and tended more toward philosophical and sociological study. That trend has not missed the professional responsibility field, but a substantial segment of scholarship within legal ethics remains either doctrinal (see, e.g., Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992)) or attending to questions of effective lawyer regulation (see, e.g., David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Symposium, *The Attorney-Client Relationship in a Regulated Society*, 35 SO. TEX. L. REV. 571 (1994)).

5. See Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 836 (1987) (describing Anglo-American legal ethics writers as preoccupied with "the issue of moral permissibility," and focusing their greatest attention on "the moral propriety of the adversary system").

6. This term relies upon David Luban's label of "moral activism," see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 60 (1988) [hereinafter LUBAN, *LAWYERS & JUSTICE*], and Naomi Cahn's phrase "moral lawyering," see Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2500-02 (1993) [hereinafter Cahn, *Inconsistent Stories*]. See also David Rosenthal, *The Criminal Defense Attorney, Ethics, and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153, 157 (1993) (referring to activists as "moralists").

7. This phrase is often attributed to William Simon. William H. Simon, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29, 36 [hereinafter Simon, *Ideology of Advocacy*] (discussing the principles of neutrality and partisanship). David Luban and Deborah Rhode coined the phrase from Simon's work, although "without suggesting that it is the sole 'standard' view of legal ethics." DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 137 (1992).

8. This phrase originated with Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980).

philosophers line up on both sides of this debate. The resulting dialogue is engaging and lively, but at the same time it is often complex, intellectually nuanced, and deeply philosophical. Since the question at issue—that of moral justification of lawyer role—is fundamentally philosophical, we of course look to the experts for their guidance and wisdom. That wisdom and guidance, in return, will often, although not always,⁹ be *prescriptive* in nature, suggesting new or alternative ways for lawyers or legal institutions to behave.¹⁰

In their prescriptive role the philosophers encounter a difficulty, albeit one that is not unique to the lawyering field. That difficulty is this: the experts have a substantially limited ability to effect within practice the results which their theories contemplate. This is particularly true in the moral lawyering debate. The discourse about the moral value of lawyering and about the implications of a lawyer's situated role on her accountability for her actions is extraordinarily sophisticated. It draws on impressive traditions of metaethics, epistemology, and moral philosophy. But this discourse can never emerge with final answers; most of the *practice* choices are left to those who are the object of the discourse, the practicing lawyers, whose sophistication is almost always in areas different from philosophy. Absent an effective connecting translation between the two, the philosophers' debate is of dubious use to those whom it is intended to aid.

In this Article I describe ways in which the philosophic debate aids good faith lawyers, as well as the ways lawyers are stranded by it. The philosophic debate aids lawyers through its articulation of an orientation toward practice that credits the lawyers' moral sensibilities. It strands those lawyers, though, by its implied message that accomplishing moral reconciliation of the competing interests within lawyering calls for deeply sophisticated philosophical reasoning. To make these

9. A great deal of what the philosophers accomplish is descriptive and analytical, without necessarily intending to direct lawyers' lives in a particular way. See WILLIAM K. FRANKENA, *ETHICS* 4-5 (1963) (comparing analytical and critical thinking in moral philosophy with normative, applied ethics). Much of the work of recent philosophers has been criticized, in fact, for its lack of connection to real world experience. See Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *STAN. L. REV.* 1627, 1641-42 (1993). Those complaints notwithstanding, much of applied ethics is directly intended to aid practice judgments. See *id.* at 1627; BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 3-11 (1985).

10. An integral part of my argument here is the idea that moral philosophy intends to affect practice. Moral philosophy is, in other words, *prescriptive* in addition to, or as opposed to, descriptive or analytical. Some have argued that the "applied ethics" task of moral philosophy can *only* be prescriptive, in that "moral theory does not describe an existent world; at best it guides the conduct of one species of living things within that world." ANNETTE BAIER, *POSTURES OF THE MIND: ESSAYS ON MIND AND MORALS* 209 (1985).

points, I shall describe a lawyer/client experience of some moral ambiguity taken directly from the practice I observe in my clinical teaching. From that description, I shall analyze the kinds of choices left to lawyers by the activist models constructed by the philosophers. This account shows that the activist vision cannot sidestep substantial risks in its implementation, risks driven by its inherent reliance on non-philosopher discretionary judgments unaccompanied by a reliable method by which to exercise that discretion. As I use an example from a legal aid setting, its account will also show some of the (perhaps counterintuitive) conservative tendencies of the activist vision when that vision encounters poor clients. This conservative consequence might not be a criticism in and of itself, but it helps to recognize some unstated implications of the standards chosen by the philosophers for their activist model.

Before I describe the interactions in the clinic, I shall introduce the activist model. As shall be seen, the ongoing controversy about the nature of an activist role leaves the task of identifying it for implementation purposes itself a tricky endeavor.

II. CONSTRUCTING A WORKING IMAGE OF MORALLY ACTIVIST LAWYERING

We encounter certain difficulties when we endeavor to articulate a reasonably coherent vision of this moral activism. Such a vision should be congruent with the philosophers' teachings and should differ in some observable way from the traditional view that lawyers have possessed of their roles in the past. The problem, though, is that the activists do not speak with anything close to one voice. Disagreements exist at quite fundamental levels, reflecting in many cases controversies within moral philosophy that are decades, or even centuries, in the making. To describe one activist vision, then, I would need either to resolve those controversies, or ignore them in some way. Neither choice seems quite principled. This difficulty represents a central element of my argument in this Article, which is that lawyers who choose to be activist cannot avoid precisely this quandary. In order to justify her chosen brand of activism, that lawyer must overlook or resolve arbitrarily some of the metaethical¹¹ questions with which the philosophers strug-

11. My use of the term "metaethics" or "metaethical" in this article may not correspond precisely to that term's accepted meaning within the study of philosophy. Philosophers employ "metaethics" to capture a different concern from "normative ethics," which asserts or defends particular versions of the good or the worthwhile. Normative ethics is in this way substantive. Metaethics, in contrast, asks such "process" questions as: What is the meaning or use of the expressions "(morally) right" or "good"? How can ethical and value judgments be es-

gle.

I proceed amidst this difficulty by describing first the broadest shared view of activism, along with a brief history of the philosophers' debate within that shared conception. I then focus on the two most prominent versions of activism, those inspired by David Luban and William Simon. These two prototypes can then serve as a basis for my later observations of the student work in a clinical setting.

A. THE PHILOSOPHERS' CRITIQUES

As described earlier,¹² moral activism in its broadest sense demands accountability from lawyers for their actions, and tends not to permit the mere fact of occupational role expectations to justify lawyer conduct. The morally activist view appeared first, it seems, with Richard Wasserstrom's 1975 polemic questioning whether it ought to be right for lawyers to do free from censure things that those who are not lawyers could not do in similar shameless fashion.¹³ Wasserstrom's article was descriptive and questioning, but not particularly prescriptive. Other writers developed his critique, however, and began to structure an alternative view of lawyer role which would try to accommodate his concerns. The following year Charles Fried published his famous (or infamous) contrasting article *Lawyer as Friend*, which defended the standard conception of lawyer role by stressing its value in enhancing client and lawyer autonomy.¹⁴ Together the Wasserstrom and Fried articles set the contours of the ensuing conversation.¹⁵ In the late

established or justified? Can they be justified at all? See FRANKENA, *supra* note 9, at 5; see also WILLIAMS, *supra* note 9, at 72 (ethics make "substantive claims about what one should do, how one should live, what was worthwhile," but metaethics "concern[s] itself with the status of those claims: whether they could be knowledge, how they could be validated, whether they were (and in what sense) objective . . ."). My use of the metaethics term intends to capture and refer to the philosophers' critiques of legal ethics in a broad and systematic way, as contrasted with more particular claims about the ethical propriety of certain lawyering conduct.

12. See *supra* p. 2.

13. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1-2 (1975-1976) [hereinafter Wasserstrom, *Lawyers as Professionals*]. I may give Wasserstrom undeserved credit here, as some see the same issues raised by early 20th century scholars and, indeed, by the Federalists. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14-17 (1988) (citing for the "republican ideal of the lawyer's public role" Louis Brandeis and Federalist lawyers "nourished on Montesque"). Others have linked the question at hand back to Plato. Cf. James B. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 849-50 (1983); GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1095 (2d ed. 1994) (reprinting Plato's *Gorgias*).

14. Fried, *supra* note 1.

15. This 1970s colloquy followed by several years Monroe Freedman's controversial defense of the adversary system within the context of criminal defense work. See Monroe

1970s, Murray Schwartz¹⁶ and Gerald Postema¹⁷ crafted sophisticated objections to Fried's (and the traditional) nonaccountability arguments, William Simon produced a profound deconstruction of the adversary system, challenging traditional role views in a more critical way,¹⁸ and Alan Goldman offered a philosopher's sophisticated view of an activist lawyer's world.¹⁹ It was David Luban, though, who established the issue of role morality in the central position it possesses in legal ethics today. In 1983, Luban edited *The Good Lawyer*,²⁰ a rich collection of philosophical and legal essays written by prominent philosophers and law scholars about the "good lawyer versus good person" question. He followed that effort in 1988 with *Lawyers and Justice*,²¹ an articulate and advanced defense of the activist conception. *Lawyers and Justice* provoked two sophisticated responses, with rejoinders from Luban.²² That same year saw the publication of William Simon's pioneering article, *Ethical Discretion in Lawyering*.²³ In this significant work, Simon presented an activist model that departs from the customary "role morality" language by arguing that legal merit and justice, and not morality, ought to serve as the governing criterion for an activist stance. While neither Simon nor any other scholar has yet refined

Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). While the "moral activism" debate focuses virtually exclusively on *civil*, and exempts criminal, representation, Freedman's eloquent (if misguided) championing of the criminal defense lawyer developed many of the themes later relied upon within the traditionalist scholarship.

16. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978) (introducing the "nonaccountability" principle, and arguing that, whatever the merits of that principle within litigation, it is unjustified in negotiation and similar non-litigation contexts).

17. Postema, *supra* note 8, at 64 (arguing that "the [standard] conception must be abandoned, to be replaced by a conception that better allows the lawyer to bring his full moral sensibilities to play in his professional role").

18. Simon, *Ideology of Advocacy*, *supra* note 7.

19. ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 90-155 (1980).

20. LUBAN, *THE GOOD LAWYER*, *supra* note 1.

21. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6.

22. Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) [hereinafter Ellmann, *Lawyering for Justice*] (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988)); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004 (1990) [hereinafter Luban, *Partisanship, Betrayal and Autonomy*]; David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392 (1990); David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424 (1990) [hereinafter Luban, *Mid-Course Corrections*].

23. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Ethical Discretion*].

Simon's critique beyond his 1988 formulation, his attractive argument for ethical discretion has garnered great attention within the academy.²⁴ As noted earlier, Luban and Simon remain the two most prominent spokespersons for activism, appearing regularly in modern ethics scholarship.²⁵ Few scholarly efforts, though, have sought to contrast the two from the standpoint of legal practice.²⁶

My brief history of activist development cannot be complete without a mention of two other contributors, Thomas Shaffer and Gerald López. The emergence of moral activism owes an enormous intellectual debt to Shaffer, who has championed a virtuous role for lawyers since the 1970s.²⁷ Shaffer's avowedly religious and theological perspective on lawyering contrasts with the more secular philosophical arguments of most of the activist debate,²⁸ as does his attention to virtue and

24. Simon's article has been excerpted in several professional responsibility coursebooks. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 3-38 (1994) [hereinafter RHODE, PERVASIVE METHOD]; RHODE & LUBAN, *supra* note 7, at 186; THOMAS B. METZLOFF, PROFESSIONAL RESPONSIBILITY ANTHOLOGY (1994); ROBERT H. ARONSON ET AL., PROFESSIONAL RESPONSIBILITY 26-36 (2d ed. 1995); GEOFFREY C. HAZARD, JR. & DEBORAH H. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 215 (3d ed. 1994). The article has been frequently cited by other ethics scholars as well. Search of Westlaw, TP-ALL database (Feb. 17, 1995) (76 articles citing the work).

25. In addition to sources already cited, the "morally activist lawyering" debate has included: Erwin Chemerinsky, *Protecting Lawyers from their Profession: Redefining the Lawyer's Role*, 5 J. LEGAL PROF. 31 (1980); Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in LUBAN, THE GOOD LAWYER, *supra* note 1, at 38; Kenny Hegland, *Quibbles*, 67 TEX. L. REV. 1491 (1989); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985); GOLDMAN, *supra* note 19; Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); Cahn, *Inconsistent Stories*, *supra* note 6; Gordon, *supra* note 4; Peter Margulies, "Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients, 68 N.C. L. REV. 213 (1990) [hereinafter Margulies, *Interests of Nonclients*]; Jamie G. Heller, Note, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503 (1994). For those who are sympathetic in large part but not joining in the activist critique, see, for example, Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990); Griffin, *supra* note 1; Timothy W. Floyd, *Realism, Responsibility and the Good Lawyer: Niebuhr Perspectives on Legal Ethics*, 67 NOTRE DAME L. REV. 587 (1992).

26. The one in-depth comparison of the two activist exemplars offers a critique from the perspective of moral philosophy, and less from the world of practice. See Atkinson, *supra* note 25.

27. See, e.g., Thomas L. Shaffer, *A Lesson From Trollope*, 35 WASH. & LEE L. REV. 727 (1978); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979) [hereinafter Shaffer, *Moral Discourse*]; THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS (1985); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994).

28. See, e.g., Atkinson, *supra* note 25, at 944-45 (searching for a more persuasive grounding for ethical truth than religious faith).

character, instead of the more common attention to conduct and actions.²⁹ Each of these characteristics of Shaffer's work leads him to appear somewhat less central in the ethicists debate, but his influence cannot be underestimated. If Shaffer's influence is a religious one, that of Gerald López is a political one. López may have written less directly about the profession-wide questions of lawyers and moral responsibility, but deserves considerable credit for rethinking the moral relationship and interactions between lawyers and poor clients.³⁰ In his construction of a politically-charged and non-hierarchical lawyer/client relationship, López has defined "activism" for many progressive lawyers.³¹ His activism, and that of the proponents of "critical lawyering in the field,"³² though, is not synonymous with the vision I describe and discuss here. It is quite consistent with the moral activists' demand that lawyers be accountable for their actions,³³ but maintains a stance of resistance and "political unity" to "achieve justice" for poor persons.³⁴ I describe below how the agenda of morally activist lawyering might conflict with this more openly political agenda.³⁵

The development of the activist conception did not proceed without articulate reactions from defenders of the standard conception. Besides Charles Fried, authors such as Stephen Pepper,³⁶ Monroe Freedman,³⁷ Ted Schneyer,³⁸ and Serena Stier,³⁹ among others,⁴⁰ formed

29. See David Luban, *The Legal Ethics of Radical Communitarianism: A Review of American Lawyers and Their Communities* By Thomas L. Shaffer and Mary M. Shaffer, 60 TENN. L. REV. 589, 591-92 (1993) [hereinafter Luban, *Radical Communitarianism*] (responding to this contrast in focus).

30. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

31. The most prominent voices within the "new lawyering" movement build off López's commitment to client voice and empowerment, and to mobilization of disempowered groups. See, e.g., Anthony A. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994); Lucie White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 158 n.4 (1994) [hereinafter White, *From Rhetoric to Practice*] (calling López "the major theorist of collaborative lawyering"); Louise Trubek, *Critical Lawyering: Towards a New Public Interest Practice*, 1 B.U. PUB. INT. L.J. 49 (1991).

32. White, *From Rhetoric to Practice*, *supra* note 31, at 158.

33. See Cahn, *Inconsistent Stories*, *supra* note 6, at 2502-05.

34. White, *From Rhetoric to Practice*, *supra* note 31, at 158. See also Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639 (1995); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era* (1995) (unpublished manuscript on file with the author) (criticizing the "new lawyering" scholarship for attending too little to these ideals of political action).

35. See *infra* notes 113-42 and accompanying text.

36. Stephen Pepper, *The Lawyer's Amoral Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615-24 [hereinafter Pepper, *Amoral Role*].

37. MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 44-58 (1990). Freedman has

a loyal—if not unified—opposition to the developing critique. The following pages canvass many of the differences between these traditionalist defenders and the activists.

Despite, or maybe because of, the lively debate, both between the activists and the traditionalist and among the activist themselves, about how one might accommodate moral integrity and good lawyering, the philosophical underpinnings of this movement remain very much without consensus. Even if one is taken by the visceral moral force of the argument that lawyers ought to own greater responsibility for their in-role actions, the details and implications of that argument remain rather elusive. The philosophers, intrigued as they are by the moral philosophy challenge that this puzzle presents, have been somewhat less attentive to the practice implications of their teachings. If lawyers are now less confident that the traditional conception protects them from moral accountability, they are likely also to be reasonably uncertain about what the activist alternative represents.

This uncertainty reflects the several disagreements, some factual and some philosophical, that pervade recent scholarship about role morality. A significant subject of controversy is whether traditional practice is in fact troublesome,⁴¹ as the activists charge, and whether

written recently that he has “erroneously, and repeatedly” been identified as a supporter of the standard conception. Monroe Freedman, *The Morality of Lawyering*, LEGAL TIMES, Sept. 30, 1993, quoted in RHODE & LUBAN, *supra* note 7, at 180-81. Freedman clarifies his stance as holding the lawyer responsible for her *choice of clients*, but thereafter not responsible for any legal actions taken at the client’s direction. *Id.*

38. Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 WISC. L. REV. 1529, 1550-56 [hereinafter Schneyer, *Standard Misconception*].

39. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 560-72, 575-80, 582-87 (1991).

40. Other defenders of the standard conception, or critics of the new activism, include M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67 (1990) [hereinafter Smith, *Should Lawyers Listen*]; Ellmann, *Lawyering for Justice*, *supra* note 22; Richard Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990); cf. Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011 (1986) (advocating a guarded defense of the adversary system). For a less ideological but ultimately unsympathetic view of the moral activism arguments, see Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261 (1993) (arguing that attention by lawyers to moral concerns or fairness will tend to discourage socially valuable advice).

41. Luban, for instance, reads the landscape of practice as requiring, and in fact exhibiting, excessive zeal and conscienceless behavior. See Luban, *Adversary System Excuse*, in LUBAN, *THE GOOD LAWYER*, *supra* note 1, at 99 [hereinafter Luban, *Adversary System Excuse*]. Some disagree. See, e.g., Schneyer, *Standard Misconception*, *supra* note 38, at 1544-55; Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 14-17 (1991) [hereinafter Schneyer, *Hired Gun*]; Stier, *supra* note 39, at 572-73. For a colloquy that addresses in part the empirical question, see Smith, *Should Lawyers Listen*, *supra* note 40; David Luban, *Smith Against the Ethicists*, 9 LAW & PHIL. 417 (1991); M.B.E. Smith, *Reply to David Luban*,

the standards that govern that practice contribute to whatever trouble exists.⁴² If it is indeed troublesome, one must then confront the philosophical underpinnings of "role morality." Most, but not all, activist writers accept the premise of ethical role differentiation.⁴³ Other philosophers, both activist sympathizers⁴⁴ and standard conception defenders,⁴⁵ contest that premise.⁴⁶ Those who acknowledge differentiation

10 LAW & PHIL. 427 (1991).

42. Most of the writers answer this question in the affirmative. See, e.g., Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 22, at 1013-17; Simon, *Ideology of Advocacy*, *supra* note 7, at 82-83; Postema, *supra* note 8, at 64. Others disagree. See, e.g., Stier, *supra* note 39, at 554; Ellmann, *Lawyering for Justice*, *supra* note 22, at 118; Schneyer, *Standard Misconception*, *supra* note 38, at 1550-66.

There are, at the same time, voices from the more conservative wing of the academic world whose descriptions resemble far more closely those of the activist critics, but whose prescriptions appear unsympathetic to those from the activist scholars. See, e.g., M.A. GLENDON, *A NATION UNDER LAWYERS* 203-15 (1994) (recounting professionalism's decline but attributing that decline, in part, to the increase in critical teaching and scholarship among law professors); ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (like Glendon, bemoaning loss of professionalism, and attributing partial blame to critical legal studies' influence on law teaching). Writers like Glendon and Kronman do not address the activist proposals directly, and are not, it seems, critics of the adversary system, but their descriptions of the misuse and abuse of legal talent echoes that of the activist critics. By their nostalgia for a past era of shared commitment to professional values and practical reason they express a fundamental faith in the system as it is, and see any failings that we now experience as reflections of a diminution in the respect accorded to that system by today's scholars, especially the critical ones. It seems unlikely, then, that we might count Glendon and Kronman as "activists" as I use that term here. Kronman does cite Luban's and Simon's work approvingly, see *id.* at 365-67, and expresses there some measure of sympathy for their pleas for more responsible lawyering, but on the whole his grounded trust in the existing institutions differentiates him from the more critical scholars who represent the activist view. See Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1146 (1995) (reviewing ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993)).

43. Luban, most notably, argued originally that one must continually balance one's professional role with the demands of "ordinary morality," deciding in each case which one ought to prevail. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 155; see also Luban, *Adversary System Excuse*, *supra* note 41, at 117-18. Luban later recanted that formulation for one which privileges role obligations as "defeasible" but overridden in appropriately serious circumstances. Luban, *Mid-Course Corrections*, *supra* note 22, at 434-35 (responding to Wasserman, *supra* note 22). For others who have attended to the problem of role morality, see Richard Wasserstrom, *Roles and Morality*, in LUBAN, *THE GOOD LAWYER* 25, *supra* note 1 [hereinafter Wasserstrom, *Roles & Morality*]; Alan Donagan, *Justifying Legal Practice in the Adversary System*, in LUBAN, *THE GOOD LAWYER* 125, *supra* note 1; Virginia Held, *The Division of Moral Labor and the Role of the Lawyer*, in LUBAN, *THE GOOD LAWYER* 60, *supra* note 1; Griffin, *supra* note 1.

44. See Held, *supra* note 43, at 62; Ellmann, *Lawyering for Justice*, *supra* note 22, at 140; Bernard Williams, *Professional Morality and its Dispositions*, in LUBAN, *THE GOOD LAWYER* 259, *supra* note 1, at 259.

45. See Stier, *supra* note 39.

46. Those who refuse to adopt the role differentiation conception argue that the premise of a "person" role on the one hand and a "professional" role on the other is mistaken, because

between in-role and out-of-role obligations search for ways to balance the competing demands of the varying obligations.⁴⁷ That inquiry cannot help but spill over into that long-standing controversy within applied ethics about teleological and deontological moral reasoning.⁴⁸ The concern here is whether one ought establish such balance through rules, using them to maximize good over time ("rule-consequentialism"), or ought to evaluate the effect of one's actions on a case-by-case basis ("act-consequentialism"),⁴⁹ or ought to act for reasons which are not connected necessarily to maximization of the good, but for non-consequential considerations instead ("deontology").⁵⁰

The nature of one's moral obligation to obey laws (and the accompanying inquiry whether the law in question is "valid"),⁵¹ and the

there is no such concept of a "person" role unconnected to a particular circumstance, be it lawyer, parent, student, friend, neighbor, or what have you. See Held, *supra* note 43, at 66-67; Williams, *supra* note 44, at 260-61.

47. Luban argued in *Lawyers and Justice* that one balances the two considerations on an act-by-act basis, and that where the demands of ordinary morality outweigh those of the role (whose weight is dependent on its institutional justification, which in civil litigation is rather weak), one may not perform the role-obligation without moral consequences. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 155. David Wasserman took Luban to task for this "act-consequentialist" approach to moral analysis of daily work life, Wasserman, *supra* note 22, at 395-97, and Luban agreed that his original formulation was partially in error. Luban, *Mid-Course Corrections*, *supra* note 22, at 434-35. Luban now maintains that role obligations are entitled to "defeasible" respect; they will be overridden only when the demands of ordinary morality are sufficient to overcome a rebuttable presumption.

48. For an introduction to these concepts, see FRANKENA, *supra* note 9, at 14-17; J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 9-12 (1973).

49. As Bernard Williams is so often quoted as asking, "Whatever the general utility of having a certain rule, if one has actually reached the point of seeing that the utility of breaking it on a certain occasion is greater than that of following it, then surely it would be pure irrationality not to break it?" BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 102 (1972), quoted in LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 122; Luban, *Mid-Course Corrections*, *supra* note 23, at 444.

50. FRANKENA, *supra* note 9, at 16-17, 23-28; Wasserman, *supra* note 22, at 404; Luban, *Mid-Course Corrections*, *supra* note 22, at 428-33. Several other commentators on professional role morality understand these distinctions to have significant implications for this realm of moral philosophy. See, e.g., Atkinson, *supra* note 25; Donagan, *supra* note 43; Postema, *supra* note 8.

51. David Luban spends a significant portion of *Lawyers and Justice* exploring these questions. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 31-49. David Wasserman's review essay, Wasserman, *supra* note 22, at 404-14, as well as Luban's rejoinder, Luban, *Mid-Course Corrections*, *supra* note 22, at 453-62, refine the arguments. Rob Atkinson allots a substantial section of his critique of Luban and Simon to this question as well. Atkinson, *supra* note 25, at 889-947.

The importance of the question to role morality is not entirely self-evident, and arises from different sources depending on the activist theory one considers. For Luban, for example, the question affects his arguments about lawyers and the neutral partisanship principles, which "treat all laws as mere obstacles to or instruments of client interest." Luban, *Mid-Course Corrections*, *supra* note 22, at 453. By demonstrating that the law has a moral, as opposed to a

fundamental debates about objectivity, skepticism, and relativism—the metaethical questions about the choice of standards when one “does ethics”⁵²—are matters which necessarily belong, and do appear, within this philosophical exploration. The activists also debate whether “morality” ought to be the relevant criterion at all for assessing lawyer behavior. Most scholars accept “morality” as the dispositive consideration (whether “ordinary,”⁵³ “common,”⁵⁴ “tribal,”⁵⁵ “universal,”⁵⁶ “professional,”⁵⁷ or “role”⁵⁸), but, as we have seen, William Simon disagrees, proposing instead a standard of legal merit or justice as a more coherent evaluative measure.⁵⁹

purely force-based obligation, Luban may then discredit the partisanship attitude, which ignores the moral content of legal obligation. For Simon the question is perhaps more directly relevant. Since he espouses adherence to a standard of legal merit, Simon implicitly acknowledges an obligation, moral or otherwise, to accept the law as binding. As Simon’s thesis is largely a purposivist one, grounded in a commitment to “legal merit,” see Simon, *Ethical Discretion*, *supra* note 23, at 1128, it follows that he views fidelity to law as a compelling moral force. Unlike Luban, however, his arguments do not address that premise directly. Rob Atkinson criticizes Simon, in part, for this deficiency. See Atkinson, *supra* note 25, at 889-95. Other writers within the activist sphere enter this debate as well. *Id.* at 889-95, 948-49; GOLDMAN, *supra* note 19, at 34-38; Griffin, *supra* note 1, at 582-87. A related debate within professional ethics concerns how one treats law-in-action versus law-in-the-books when counseling clients about their future conduct, and how to differentiate advice from assistance in wrongdoing. See, e.g., Stephen Pepper, *Counseling at the Limits of the Law: An Exercise in the Ethics and Jurisprudence of Lawyering*, 104 YALE L.J. 1545 (1995) [hereinafter Pepper, *Counseling*].

52. Much of the activist undertaking is intended to reconcile professional needs with the dictates of morality, however defined. While some elude the question, Luban has been criticized for his reliance on “common morality” as a notion which has recognizable substance. See Ellmann, *Lawyering for Justice*, *supra* note 22, at 129-31; Atkinson, *supra* note 25, at 932-33; see also Reed E. Loder, *Out From Uncertainty: A Model of the Lawyer-Client Relationship*, 2 S. CAL. INTERDISCIPLINARY L.J. 89, 134 (1993).

Legal ethicists often offer “ordinary morality” as the standard by which the lawyer judges and resists the client’s ends. Indeed, legal ethics literature has made this crucial phrase familiar but includes remarkably little discussion of its content. The content of this idea is equivocal to say the least.

Id. (citing Wasserstrom, *Lawyers as Professionals*, *supra* note 13, at 3-9) (footnotes omitted). Many activist writers directly address the question of the reliability and sources of moral judgment. A purely relativist thinker will approach activism from a perspective very different from that of another who believes in some foundation for ethical judgments. See Reed E. Loder, *Moral Skepticism and Lawyers*, 1990 UTAH L. REV. 47, 52-57 [hereinafter Loder, *Moral Skepticism*]; Atkinson, *supra* note 25, at 867-72; see also Judith W. DeCew, *Moral Conflicts and Ethical Relativism*, 101 ETHICS 27 (1990) (canvassing the relativist and objectivist arguments).

53. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 125.

54. *Id.* at 105; Luban, *Mid-Course Corrections*, *supra* note 22, at 435; Griffin, *supra* note 1, at 266; ALAN DONAGAN, *THE THEORY OF MORALITY* 29 (1977).

55. RHODE & LUBAN, *supra* note 7, at 145 (quoting Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173, 176 (1982)).

56. Wasserstrom, *Roles & Morality*, *supra* note 43, at 32.

57. Williams, *supra* note 44, at 259.

58. Held, *supra* note 43, at 66.

59. Simon, *Ethical Discretion*, *supra* note 23, at 1090-91. Rob Atkinson challenges Luban

While not exhaustive,⁶⁰ this list captures the tenor of academics' and philosophers' debate. Two things seem certain about this debate: first, the experts will not soon resolve their differences nor achieve consensus on any of those questions (Luban calls these matters "difficult issues that no one ever gets right anyway"⁶¹); and second, those lacking expertise, the non-philosopher lawyers, will tend to be more uncertain about how to resolve the disagreements than the experts, but (perhaps unlike the philosophers) will need to act upon the matters subject to the debate. Where, then, does that leave practicing lawyers committed to constructing an ethical work life? Where does it leave

for his reliance on ordinary morality, and Simon for his reliance on justice or legal merit. Atkinson argues that both employ inappropriately "objective" and public norms as replacements for the prevailing norms of the standard conception. Atkinson, *supra* note 25, at 889-947.

60. Excluded because they seemed not to fit directly, but important in a peripheral way to the activist debate, are the issues of:

1) "character" as a moral force (*see* KRONMAN, *supra* note 5, at 16; MacIntyre, *supra* note 2; Griffin, *supra* note 1, at 263-66, 274-75; Shaffer, *Moral Discourse*, *supra* note 27, at 244-53; Williams, *supra* note 44; MILNER S. BALL, THE WORD AND THE LAW 97-99 (1993)),

2) the impact of "legal realism" on the activist project (*see* Pepper, *Amoral Role*, *supra* note 36, at 624-33; David Luban, *The Lysistratian Prerogative*, 1986 AM. B. FOUND. RES. J. 637, 646-49), and

3) the importance of narrative and stories within morally activist lawyering (*see* Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695 (1994)) [hereinafter Margulies, *Civic Republican View*].

I have also not included within my canvass of activist themes the "new lawyering" scholarship and the subjects it explores. *See, e.g.,* Anthony V. Alfieri, *Reconstructive Poverty Law and Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); LÓPEZ, *supra* note 30; Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Symposium, *The Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992). This work is a central part of contemporary legal ethics, but differs in several respects from the philosophers' project that I describe here. It is premised less on moral philosophy, is more political, and is less generalizable to private market lawyering than, say, the Luban/Simon debate might be. And, while there are several areas of overlap (e.g., the "new lawyering" scholars are certainly "activist," and represent a search for moral integrity within this profession), I argue below that the goals of critical poverty law may not meld well with the suggestions from the moral activists. *See infra* notes 175-86 and accompanying text.

61. Luban, *Mid-Course Corrections*, *supra* note 22, at 424. Luban proceeds: "Moral philosophy is like the clarinet, the instrument Benny Goodman once defined as 'an ill woodwind that nobody blows good.'" *Id.* The frequency within ethics literature of criticism of moral philosophy for its inveterate uncertainty, its incomprehensibility, and its lack of relevance to practical issues, is remarkable. In addition to Luban's remarks, Martha Nussbaum quotes Cicero: "Their [the philosophers'] narrow little syllogistic arguments prick their hearers like pins. Even if they assent intellectually, they are no way changed in their hearts, but they go away in the same condition in which they came." Nussbaum, *supra* note 9, at 1642 (quoting CICERO, DE FINIBUS 4.7). Alasdair MacIntyre has argued that modern moral philosophy is of little use to the practical professions because its "disputes between rival and conflicting rules . . . are in fact rationally insoluble." MacIntyre, *What Has Ethics to Learn*, *supra* note 2, at 42.

law students and their teachers?

One way to begin to address these questions would be to compare two suggested activist models, without pretending to have resolved the intellectual debates that might separate the two. We do have available two rather distinct "models" of activism, one from Simon and the other from Luban, each fairly accessible to lawyers and each in its own way achieving some provisional resolution of the above issues. I use the next section to introduce each, and later in this Article I then try to apply the two to some concrete lawyering experiences.

B. TWO ACTIVIST MODELS: LUBAN AND SIMON

While the philosophers engage in the debates just described, two contrasting visions of activism remain prominent in both teaching and scholarship. David Luban's "common morality" based conception⁶² and William Simon's "legal merit," or "justice" based, conception⁶³ are the two versions of non-traditional lawyering which have received the most intense attention. Together the two offer lawyers a plausible choice between competing arguments about the underpinnings of an activist stance. An activist-sympathizing lawyer feeling perplexed or overwhelmed by the philosophy debates just described might comfortably choose between a Luban and a Simon approach to her work, if only because the two are the most visible choices and differ in understandable ways.

1. David Luban's Commitment to Common Morality

It is not my purpose here to describe in great detail the Luban thesis, but I do need to highlight two aspects of his work if we are to understand the message to a lawyer in practice. First, there is Luban's underlying skepticism about the adversary system excuse. Luban employs what he terms the "Fourfold Root of Sufficient Reasoning"⁶⁴ to demonstrate that lawyers ought not be morally exempt from criticism because they are performing an important role within the adversary system. Whenever a person in a role intends to act in a way which, but for that role, would be morally troublesome, and wishes to employ the role as a justification for acting in that way, she must rely upon the Fourfold Root, which Luban describes as follows:

62. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 105.

63. See Simon, *Ethical Discretion*, *supra* note 23, at 1090.

64. I offer here, as references to this phrase commonly do, the obligatory footnote pointing out that Luban regrets the inartfulness of this phrase, which in fact is a pun of sorts within philosophical circles. See Luban, *Mid-Course Corrections*, *supra* note 22, at 426-27.

[T]he institutional excuse, fully spelled out, will take the [following] form . . . : the agent (1) justifies the institution by demonstrating its moral goodness; (2) justifies the role by appealing to the structure of the institution; (3) justifies the role obligations by showing that they are essential to the role; and (4) justifies the role act by showing that the obligations require it.⁶⁵

Luban's argument is that mere reliance on a role is insufficient to justify questionable actions, but using ordinary morality as a trump is equally inappropriate.⁶⁶ The Fourfold Root suggests a method of separating those acts that have justification because of their institutional role flavor from those that do not. Luban contends that this justificatory process and analysis may be applied by practicing lawyers in the "hurley-burley" of their practice.⁶⁷

The standard by which he expects assessment of (but not trumping of) role acts is that of ordinary morality,⁶⁸ which Luban argues is susceptible to coherent understanding.⁶⁹ In his Fourfold Root analysis Luban affords a weak justification to the adversary system, the "pragmatic" realization that the system, despite its flaws, seems to be as effective as any other system. Thus, a lawyer's deliberations cannot rely heavily on that system to license acts that otherwise would be significantly troublesome from a standard of common morality. When the justification for the role-acts are insufficient to trump moral considerations, several things follow: at a minimum, the lawyer must accept moral responsibility for her actions;⁷⁰ she also ought not continue to assist that client⁷¹ and, in some instances, she may be justified in betraying her client.⁷²

65. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 131.

66. Luban, *Mid-Course Corrections*, *supra* note 22, at 434-35.

67. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 140-41. *See infra* notes 155-56 and accompanying text (discussing Luban's "seven step" process of weighing role obligations).

68. Luban later qualifies the arguments he made in *Lawyers and Justice* about an equal balance between role obligations and common morality and moves to a position in which role morality is the defeasible default position. Compare LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 125 with Luban, *Mid-Course Corrections*, *supra* note 22, at 434-35.

69. *See, e.g.*, Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 22, at 1023-25. Luban has been criticized for this characterization of common morality. Ellmann, *Lawyering for Justice*, *supra* note 22, at 129-30.

70. Luban, *Adversary System Excuse*, *supra* note 41, at 118.

71. LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 173-74.

72. Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 22, at 1026.

2. William Simon's Commitment to a Conception of Legal Merits

William Simon's article *Ethical Discretion in Lawyering*⁷³ has had a significant impact upon the world of legal ethics.⁷⁴ Like Luban, Simon opposes the "neutral partisanship" stance of the traditional defense of advocacy and lawyering, captured by the "zealous advocacy" conception so often repeated in conventional ethics discourse.⁷⁵ Unlike Luban, though, Simon rejects the common opposition of "private" moral decision-making to legal decision-making. Instead, Simon proposes a realm of "ethical discretion," which he describes as a mandate to lawyers to "seek justice,"⁷⁶ but which, on further reflection, appears to be largely purposivist in intent and in implementation. I use the term "purposivist" to capture a sense of obligation to respect the obvious and apparent purposes of the substantive law⁷⁷ to "vindicate our legal ideals."⁷⁸

Simon's conception is more easily cognizable than Luban's, in that it relies upon a set of criteria (substantive law standards) for which, he argues, we possess more of a common shared language.⁷⁹ Yet, Simon's suggestion is also more inscrutable and complex in application, in that his definition of "legal merits" encompasses more than a straightforward purposivist perspective on substantive law. This point needs brief development here if we are to understand how a working lawyer might apply Simon's reasoning.

Simon argues that lawyers ought to possess ethical discretion to "take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice."⁸⁰ He divides that task into two realms, "relative merit" and "internal merit."⁸¹ The ques-

73. Simon, *Ethical Discretion*, *supra* note 23.

74. *See supra* note 24.

75. *See, e.g.*, ABA CANONS OF ETHICS Canon 15 (1908) ("The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability'"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1981) (entitled "Representing a Client Zealously"); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 579 (1986) ("The principle of zealous regard for a client's interests is pivotal . . .").

76. Simon, *Ethical Discretion*, *supra* note 23, at 1090.

77. *See, e.g.*, Heller, *supra* note 25, at 2509-10; Gordon, *supra* note 13, at 11-30.

78. Simon, *Ethical Discretion*, *supra* note 23, at 1083-84.

79. *Id.* at 1113-14. Simon argues that his approach is "grounded in the lawyer's professional commitments to legal values." *Id.* at 1113. The contrasted "nonlegal" (by which he means private morality) approach demands distinctions for which "[t]here are currently no generally accepted guidelines." *Id.* at 1114.

80. *Id.* at 1090.

81. *Id.* at 1091.

tions of internal merit are of the greater interest for present purposes. They are the insights for which Simon has attracted the most attention.⁸² The internal merit obligation “requires that the lawyer make her best effort to achieve the most appropriate resolution in each case.”⁸³ Simon takes pains to emphasize that the “most appropriate resolution” means the most appropriate *legal* resolution, not the most appropriate *moral resolution*.⁸⁴ As he writes,

[The discretionary approach] differs from many critiques of prevalent legal ethics doctrine that would appeal to moral concerns outside the legal system against values associated with the legal role. The argument here is that ethical discretion would best vindicate *our legal ideals* and contribute to a more effective functioning of the lawyer role.⁸⁵

Simon further states, “The discretionary approach is grounded in the lawyer’s professional commitments to legal values. It rejects the common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary morality on the other.”⁸⁶

82. I do not mean to imply that the “relative merit” arguments are unimportant. Simon brings to private practice generally a theme that has been central to institutional poverty law practice for some time. For legal services lawyers, questions of “relative merit” are always present, as office staff must determine which low income persons among the population of many ought to be accepted as clients of the office. For discussions of the considerations involved in that inquiry, see, e.g., Gary Bellow & Jean Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990) [hereinafter Tremblay, *Community-Based Ethic*]; cf. John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994) (applying “relative merit” standards to plight of overworked public defenders). Simon’s “relative merit” argument is controversial in that it applies a normative client choice theory to private lawyering settings, where free choice of clients has been assumed to be the norm.

83. Simon, *Ethical Discretion*, *supra* note 23, at 1096.

84. Simon introduces “internal merit” considerations by pointing out that the traditional approaches “authorize or require the lawyer to act in a way that she would concede . . . frustrates the most *legally* appropriate resolution of the matter.” *Id.* (emphasis added). He later argues that a lawyer’s choice of approaches “should depend on which approach seems better calculated to vindicate the relevant *legal merits*.” *Id.* at 1103 (emphasis added).

85. *Id.* at 1083-84 (footnote omitted). Simon cites two sources as authority for the approach he rejects, GOLDMAN, *supra* note 19, and Wasserstrom, *Roles & Morality*, *supra* note 43. He notably does not cite David Luban in this footnote, despite Luban by 1988 having published *The Adversary System Excuse*, *supra* note 41, arguing in a sophisticated way for precisely such a law/morality difference.

86. Simon, *Ethical Discretion*, *supra* note 23, at 1113-14 (footnote omitted). Here, again, Simon refers only to Alan Goldman and Richard Wasserstrom as authorities for the opposing view. See *supra* note 85.

One might rely on these arguments to conclude that Simon has offered a "discretionary purposivist" approach to lawyering, by which lawyers would choose those actions which are best calculated to achieve the goals and intended purposes of the substantive law established in generally applicable legal authority. That construction of the Simon approach would be workable, if perhaps not without controversy and uncertainty. Good faith lawyers might find it within their realm of expertise, even if frequently contrary to their desires.

Yet, Simon's suggested approach, despite the implications one might draw from the quoted language above, is not so easily purposivist. It is true that Simon urges adherence to legal values, and not commitment to ordinary or private morality. But his definition of legal values allows for interpretive judgments of "legality" that are deeply complex. This stance leaves his suggested proposals far less easily transferable to practice, but arguably more principled and more advantageous to subordinated or dispossessed clients, as later discussion will show.⁸⁷

Simon's insistence that lawyers consider the reliability of dispute resolution institutions⁸⁸ and the clarity of legislative intention⁸⁹ fits nicely into the purposivist interpretation. It is his twist on the topic of legislative intent, however, that introduces more complex discretionary interpretation, by which lawyers may depart from following even clear laws administered by reliable institutions. Consider two of Simon's examples. His first is straightforwardly purposivist. It looks at an Internal Revenue Service (IRS) case in which the administrative intentions are unambiguous, and the administrative/bureaucratic procedures are inefficient or unreliable for achieving the regulation's goals.⁹⁰ Simon's point is that a lawyer ought not act instrumentally to avoid the IRS rule, even if it is arguably "legal" to do so.⁹¹ Simon contrasts that example with one involving a welfare program, Aid to Families with Dependent Children (AFDC), whose parallels are striking but whose analysis is different.⁹² The AFDC example shows a comparable rule whose purposes seem apparent and whose institutional enforcement means are inept or overburdened, in ways which mirror the IRS exam-

87. See *infra* notes 187-202 and accompanying text.

88. According to Simon, the more reliable the institution, the more a lawyer ought to act formally. Simon, *Ethical Discretion*, *supra* note 23, at 1097-98, 1105.

89. Simon argues that the clearer the legislative intent, the more a lawyer is bound to honor it. *Id.* at 1103.

90. *Id.* at 1104-05.

91. *Id.*

92. Simon, *Ethical Discretion*, *supra* note 23, at 1105-07, 1115-16.

ple. Simon argues that a lawyer in the welfare case has no, or at least considerably less, discretion to defeat the wishes of her client.⁹³ His reasoning is that in the welfare case the institutional messages represent legal merit less well. Simon accomplishes this in two ways. First, Simon posits that lawyers ought to look not just at the *clarity* of the relevant purposes of the law, but whether or not those purposes are “problematic.”⁹⁴ In his words, “‘Problematic’ purposes are purposes that pose an especially grave threat to fundamental legal values.”⁹⁵ The more problematic the purpose of the law, the more the lawyer is entitled to treat the relevant norms formally. In other words, a lawyer more comfortably may exploit, in an instrumental way, a norm whose purpose is troublesome, even if in doing so the lawyer is frustrating the apparent (troublesome) purpose of the norm.

Second, Simon seeks to include in his commitment to legal ideals a conception of “lawyer nullification,” through which lawyers in their private transaction may disregard otherwise legitimate orders from legislatures or regulators if those laws are “plainly wrong” when judged by “[a norm] so fundamental that it amounts to a precondition of legal legitimacy.”⁹⁶ In this second approach Simon rejects the simple purposivist analysis. He proposes purposivist lawyering when the relevant norms are coherent, legitimate, and not inconsistent with fundamental legal values. Otherwise, however, a lawyer is not necessarily constrained by a norm even if it is exceptionally clear and is the product of what otherwise might be a legitimate political process.

The broader Simon view is not without analytical difficulty.⁹⁷ It also may not translate easily to a workable ethic for non-philosopher practicing lawyers, but it warrants inclusion within the conversations that I create below. I opt to differentiate Simon’s more narrow purposivism from his broader vision of legal-merit-as-justice for the purposes of my later discussion. Dividing Simon’s conceptions into two versions leaves us with three contrasting approaches to the traditional paradigm. These approaches are: (1) the ordinary morality version, which captures David Luban’s thesis, (2) the purposivist version, which is the distorted but simplified Simon thesis, and (3) the justice-based version, which includes Simon’s broad view of legal merit.

93. *Id.*

94. *Id.* at 1103.

95. *Id.* at 1104.

96. *Id.* at 1115-16.

97. Rob Atkinson has developed an intricate critique of Simon’s reliance on such an undefined and unanchored conception of legal merit. See Atkinson, *supra* note 25, at 889-906.

Our next task is to apply, or to try to apply, these three renditions to actual work one might confront in a legal services office. In this examination of practice, my goals will be to compare a morally activist stance to the traditional one (again, one expects that the progressive proposals would change the fabric of practice in some respects), to assess the impact of an activist posture on poverty lawyering, and to contrast the three versions of morally activist lawyering in terms of effectiveness and coherence.

III. A LAW STUDENT, AN EVICTION, AND MORAL CONFLICT

A. INTRODUCING THE CONTEXT OF THE EXAMPLE

In this Part, I introduce a real example of ethical conflict in a practice setting. The story I have chosen is one all too common among legal services practitioners. It is frequently cited by legal services opponents as paradigmatic of the instrumental, amoral use of law that legal services lawyers purportedly use for their clients. It is a story of a family that failed to pay rent to their landlord and who, when the landlord tries to evict them, respond with defenses and counterclaims, many of them technical.⁹⁸

Before I recount the facts of this example, I need to address two possible objections to my use of this kind of tale as an example through which to watch morally activist lawyering. The first objection concerns the moral texture of the case I have chosen. The second objection questions my use of a specialized practice setting such as legal services for my observations, which ought to have some applicability and relevance to practice generally. I think the latter objection is more sound, but I address each and ultimately reject both.

The example I use is different from those that conventionally appear in the moral lawyering literature because of its lack of clear moral violation. Most of the activist literature, both supportive and critical, tests or defends its differing moral perspectives by pushing matters to their moral limit. Readers almost always come upon the

98. For a distorted, unbelievable, but powerful version of this tale, see the Hollywood film *PACIFIC HEIGHTS* (CBS/Fox Studios 1991). Alleged abuse of landlord/tenant law is a common theme in literature and popular press accounts critical of legal services practice. See, e.g., H. Dennis Beaver, *Attorneys Earn Their Low Esteem*, CAL. B. J., May 1995, at 8 ("The Legal Aid attorney who knowingly helps deadbeat tenants avoid paying rent rationalizes his or her actions with two of the sweetest-sounding words in our vocabulary: zealous representation"); Stephanie O'Neill, *Tenants from Hell: Professional Deadbeats, "Petition Mill" Scam Artists Imperil Small Rental Property Owners Unfortunate Enough to Select Them as Renters*, L.A. TIMES, Aug. 8, 1993, at K1 (describing abuses of court processes by private "petition mills").

Lake Pleasant Bodies story,⁹⁹ and frequently the aneurysm case (where the teenage boy may die if his opposing lawyer does not reveal his fatal condition).¹⁰⁰ Readers might at times see the Leo Frank case, where a lawyer knows the identity of the perpetrator of a crime but, bound by confidentiality, remains silent as a wrongfully accused man is convicted of the crime.¹⁰¹ They often encounter the cross-examination of the innocent, truthful rape victim.¹⁰² Even the non-violent among the familiar examples possess some unquestionable moral harm: refusing to pay a just debt, for instance.¹⁰³ These are tremendously powerful examples by which to test one's understanding of the limits of role and of accountability. They serve the purposes of the activist architects well. To be honest, however, these dramatic conflicts don't happen *all* that often.¹⁰⁴ The moral anguish of practice is more nuanced and subtle. Not only are answers less clear, but whether there even is a problem is often an open question. Yet, the activist suggestions ought to apply to the messier, more ambiguous moral world, and the example I use tries to capture a small part of it. I, for one (and my students, for others, and our opponents, for even more others), find the landlord/tenant example to be at the least ethically ambiguous and complicated.¹⁰⁵

99. The "Buried Bodies" or "Lake Pleasant Bodies" case refers to *People v. Belge*, 372 N.Y.S.2d 798 (Onondaga Co. Ct.), *aff'd*, 376 N.Y.S.2d 771 (1975), *aff'd*, 359 N.E.2d 371 (N.Y. 1976). In *Belge*, a criminal defendant confessed to his lawyers that he had murdered three students and told them the location of the bodies. The defense lawyers visited the scene and photographed the bodies, but refused to inform the relatives that the students were indeed dead. The lawyers were exonerated by the courts and bar officials, relying on the lawyers' overriding obligations of confidentiality.

100. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

101. See ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 214-15 (3d ed. 1984); Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29, 37-38 (1991).

102. See, e.g., Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 22, at 1006; Harry Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 129-36 (1987).

103. See *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957) (discussed in Wolf, *supra* note 25, at 46; LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 9-10).

104. I have been a practicing lawyer, either directly or through clinic students, for about 16 years, and I confess that I have never encountered buried bodies, or an undiagnosed aneurysm, or a mistaken identity prosecution in any of my work. But my practice is always ethically challenging, which is of course my point.

105. I easily could have reversed the roles, and used for my discussion the "lousy four bill landlord tenant case" (see LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 140-42), in which a landlord is using proper law to evict a tenant without cause in an unjust fashion. Indeed, the ALI Proposed Restatement of the Law Governing Lawyers uses that kind of proceeding as an example of a possibly "repugnant or imprudent" request by a client which would justify a lawyer's withdrawal from representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAW-

But what about the use of a legal services setting? Will that example be transferable and useful? My reasons for using the field of poverty lawyering for this inquiry are a mix of expedience and curiosity.¹⁰⁶ The first of the reasons is that this setting is "there." If morally activist lawyering is to be accepted by the bar as an alternative conception of ethical practice, it is likely to happen because the conception is taught to soon-to-be lawyers in law school. If the conception is to survive the theorists, it ought to be taught in law school clinics, which generally will involve the representation of poor people. Hence, the first "laboratory" for morally activist lawyering will be a poverty law setting. As one who teaches in such a context, I can draw upon my experiences within such a laboratory.

My second reason is somewhat distorting, but valuable none the less. An advantage, but also a weakness, of studying the morally activist view within the legal services environment is that virtually all

YERS § 44 (Tentative Draft No. 5, 1992) (including the landlord example along with an assertion of "the statute of limitations against a just claim" as in that genre). For recent scholarship which captures the plight of poor tenants and their victimization and vulnerability, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Homer C. La Rue, *Developing an Identity of Responsible Lawyering Through Experimental Learning*, 43 HASTINGS L.J. 1147 (1992); cf. Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1740 (1993) (using eviction as an example of "coercive action" by the legal system against subordinated persons).

My reasons for not using the "good tenant/bad landlord" example were several, including some developed in the text. I have experience with the case I describe, which assists my application of the theories to the practice. I also find the moral implications of my story more interesting, with the (arguably) less powerful party the one whose ends are thwarted. One of my themes in this work is that some versions of morally activist lawyering will disfavor poor clients, and I needed this context to make that point.

106. Some of my reactions to moral activism drawn from this poverty law setting suggest insights applicable to the private world of fee-for-service, as I describe below. In other ways the discussion is incomplete because of my chosen specialized setting, and the fee-for-service world will need its own exploration in later work. There is one segment of that world, though, that has particular applicability to the ideals of moral activism, even if I cannot address it here. This is the world of highly regulated clients, from which doctrine is developing mirroring in many ways the counter-traditionalist views of the activists. The 1992 Kaye Scholer/Office of Thrift Supervision dispute, for example, has caused many to reconsider the usual "full zeal" posture of traditional legal education when lawyers work with organizational clients with obligations beyond the direct organizational constituents. For a sampling of the commentary on Kaye Scholer, much of it dealing with precisely that issue, see, e.g., Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395 (1993); *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. CAL. L. REV. 977 (1993); Robert G. Day, *Administrative Watchdogs or Zealous Advocates? Implications for Legal Ethics in the Face of Expanded Attorney Liability*, 45 STAN. L. REV. 645 (1993); Symposium, *The Attorney-Client Relationship in a Regulated Society*, 35 S. TEX. L. REV. 571 (1994).

market forces have been defined away, along with their corrupting possibilities. At the risk of stating the obvious, it is important to note that any moral lawyering stance will be client-unfriendly, almost by definition.¹⁰⁷ Any activist stance that we observe will have a premise that asserts that lawyers may reject certain client-chosen means or goals as ethically inappropriate. The entire thrust of an activist conception is that our traditional conceptions have sanctioned instrumental lawyering in an amoral way, permitting or requiring attorneys to act in ways that, on reflection, deserve reproach. It will almost always be the case (can one conceive of an exception?) that the difference between a traditional conception and an activist stance will be that under the former the lawyer follows the wishes of her clients, while under the latter the lawyer does not. Morally activist lawyering, then, presents some serious profitability concerns, especially in a law firm environment where traditionalists compete with activists.¹⁰⁸

My purposes here do not include exploring this purported vulnerability of the activist model. By choosing a legal services setting to look at the life of an activist lawyer, I have excluded from the problem these market-based concerns because, for the most part, the usual market forces do not prevail within subsidized poverty law settings. A client who is unhappy with his less-client-centered activist lawyer may, of course, always opt to terminate the representation, but a poor client will almost always have no other place to go.¹⁰⁹ This is a sobering

107. See Simon, *Ethical Discretion*, *supra* note 23, at 1127 ("The discretionary approach puts the lawyer in opposition to clients by reducing her power to injure others for the sake of the client.")

108. See GOLDMAN, *supra* note 19, at 148-49; McG. Bundy & Elhauge, *supra* note 40, at 319-22. But see Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 230, 244-45 (Robert L. Nelson et al. eds., 1992) (arguing that the "race to the bottom" fear is overplayed in the professionalism debates).

While not precisely in the activist genre, the recent study by Robert Mnookin and Robert Gilson comparing cooperative with predatory lawyering styles, with an eye toward the profitability and client-benefit advantages of each, offers some hope that the contrast I draw might be overstated. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512-13 (1994). This very thoughtful and ambitious article examines the economic and psychological pressures that tend to encourage litigants to employ gladiators rather than collaborators, but notes certain incentives and practice structures that could reverse those incentives, and make collaborators more profitable for clients in certain cases. However, most of Gilson and Mnookin's suggested practice structures encouraging cooperative lawyering do not apply easily to a legal services setting.

109. A federally funded legal services office is required by federal law to restrict its clientele by income and by case type. 45 C.F.R. § 1611.3(a) (1995) (income maximum); 45 C.F.R. § 1612.1-.12 (1995) (restriction on activities). All such offices establish service areas as well,

realization. For present purposes, however, we may use it to test the workability of the activist conception virtually unaffected by the concern of mutinous clients.

There is a final reason for my wish to use legal services as the focus of this Article. It has to do with the political implications of the activist model. As we can easily see, a morally activist lawyer in legal aid will obtain fewer benefits for her client than will a traditionalist.¹¹⁰ Moral activism will "harm" poor people, if we intend the term "harm" to include the loss of some benefits the existing system would otherwise yield to them. Understanding this fundamental realization leads us back to at least one of the concerns among the sophisticated philosophers, ethicists, and scholars. Differing versions of morally activist lawyering will lead to different kinds of "harm" to poor clients. That conclusion might affect one's assessment of the competing activist models. An activist conception which is grounded in legal purposivism, as I read William Simon's more narrow conception,¹¹¹ will be of particular concern to advocates for the poor if we assume, as I do, that legal purposivism tends by and large to be conservative. An activist conception grounded in shared notions of ordinary morality, as I read David Luban's view,¹¹² may be less conservative, although how one defines ordinary morality has a significant impact on that score. Similarly, the broad view occasioned by Simon's "justice" thesis resembles Luban's less constrained standard, which may, by my analysis, be more attractive to poverty lawyers.

The fact that morally activist lawyering might harm poor clients is not reason, in itself, to say that the conception is flawed. Poor clients, like wealthy clients, ought not be immune to ethical critique; progressive lawyers are obligated to practice responsibly and honorably. But the implications of this harm are not insignificant. Consider, for instance, the teaching implications. If nothing else, this harm leaves the

and persons not living in the geographical catchment area will not be served. Cf. 45 C.F.R. § 1620.3 (1995) (mandating client access within "the [office's] service area").

110. It is important to stress that my focus on a legal services practice will involve the individual client representation model of that practice, and not the model of a public interest lawyer with collective agendas and broader purposes. David Luban has developed at some length a theory of moral activism in the latter, "public interest" context. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 160-61. There are important differences between the two with respect to what an activist stance would look like. I choose the former in part because it contains the data I possess (most law school clinical training involves "smaller," individual disputes), and in part because that phenomenon resembles more closely the private attorney/client representation model to which this investigation may have some application.

111. See *supra* notes 73-97 and accompanying text.

112. See *supra* notes 64-72 and accompanying text.

conception somewhat less attractive as a working model in law school clinical settings, particularly among those teacher/lawyers who view clients as oppressed and entitled to whatever lawful breaks they might be able to obtain. With teacher/lawyers who are less "rebellious" there is a contrary concern. Clinical teachers who believe in an activist model for private lawyering must demonstrate that model in their clinics, with poor clients. There is great risk in teaching that activism is a superior stance among propertied classes but not among oppressed classes, even if that distinction is justifiable. Teachers who adhere to this desire for consistency will encourage students to practice moral activism in the clinics, with all of its client-unfriendly attributes. This has the potential result of encouraging, subtly or otherwise, the biases many students bring to law school about the greed and manipulation of poor clients in a welfare system.¹¹³ The setting having been set and explained, we now turn to an instance of moral ambiguity in ordinary practice.

B. ONE EVICTION STORY (AMONG MANY)

Christopher was a second year student who enrolled in the law school's civil clinic for the Spring semester. His third case of the term was the Hunter matter. It was, in the parlance of the office, an "eviction case." The intake form told Christopher that Cathy Hunter was thirty-three years old, married to Patrick, age thirty-four, and with two children, one age three and the other ten months. Cathy had called the clinic after receiving a Summary Process complaint, which is the Massachusetts device for commencing an eviction proceeding in court.¹¹⁴ The short write-up noted that the Hunters' landlord claimed that they owed \$3,750 (or five months) in rent, but that the tenants were complaining about unsafe and unsanitary conditions at their home.

Christopher interviewed Cathy, who came in with her two children but without Patrick. He found her story compelling. When Cathy moved into the apartment about a year ago the building was in the process of being taken over by her current landlord, Carl LeBlanc, from a bank that had foreclosed on the previous owner's interests. Cathy and Patrick dealt with a bank official, not with Carl, in arranging their rental. The bank representative offered them an incentive when they moved in; if they could find a tenant for one of the other

113. See Margulies, *Civic Republican View*, *supra* note 60, at 695, 707-08 (describing student stereotyping of clients).

114. See MASS. GEN. L. ch. 239, § 2 (1994).

vacant units, they would get a month's rent free. The Hunters were able to do this. They knew of a friend's friend who needed an apartment, so they did not have to pay for the second month they lived in the unit.

Cathy described Carl LeBlanc as a nasty, frugal, judgmental, absentee landlord—in short, not a very nice man. The Hunters had a number of serious problems with the apartment from the time they moved in, including drafty windows in the winter, mice scurrying across the floor, plumbing that did not work right, and an occasional lack of hot water. Cathy admitted that they had fallen behind on the rent, but not nearly as much as LeBlanc was claiming. She pointed out that LeBlanc was not giving them credit for the bank's free month, and furthermore had never credited them with some rent they had paid. She believed that the family was behind in rent only by about a month and a half or two months at most. Cathy had heard from the local tenants' organization that, given the problems with the unit, a court should forgive that amount. She told Christopher that when the family moved in, Patrick was working for a food distributor in town, but he was laid off soon after. He had been looking for work off and on, but he also applied for disability benefits because of back pain of long duration that was getting worse. Cathy asked whether the clinic could help out with that issue. In the meantime, the family lived off of Aid to Families with Dependent Children (AFDC), which provided a monthly cash grant of \$668 for a family of four (which was less than the monthly \$750 rent), plus \$195 in food stamps and Medicaid coverage.

Cathy was very angry at the landlord. She felt he had been harassing them ever since they began having trouble paying the rent. On three separate occasions, LeBlanc came into the apartment without their permission, once surprising them at 11:00 a.m. on a Saturday while the couple slept on a fold-out couch in the living room. Christopher's interview also turned up the following facts: The landlord had taken a \$750 security deposit from the Hunters, but had never sent them a receipt telling them that the funds were deposited into a separate, interest-bearing account free from the claims of LeBlanc's creditors.¹¹⁵ Christopher also learned that, while the tenants had received a properly drafted Notice to Quit,¹¹⁶ the Constable had left the notice under the

115. In Massachusetts, a landlord who accepts a security deposit must deposit the funds in an interest-bearing account, free from claims of creditors of the landlord, and must notify the tenant of the location of that account. Penalties for violation of these obligations include mandatory treble damages (return of the deposit along with double damages). MASS. GEN. L. ch. 186, § 15B (1994).

116. As in most jurisdictions, a landlord in Massachusetts must terminate a tenancy by

door of the apartment across the hall, where their friend lived. Cathy had received the notice on the same day it was delivered, but she had received it from her friend, not from the Constable.

Cathy's goal was to avoid eviction for as long as possible. It was March and still cold in New England. Her youngest child was ten months old and was often sick. It would take the Hunters several months to find a new apartment, especially with the need for the first month's rent, last month's rent, and security deposit (which together could easily total \$2,250) most new landlords would demand. She was desperately fearful of being homeless. Her family was in Ireland, so she had no chance of staying with them if she was evicted. Her husband had some relatives living nearby, but he was not on very good terms with them, so living with his side of the family was also out of the question.

Christopher was quite moved by his interaction with Cathy, who seemed to be the victim of so much bad luck. Her landlord sounded like a mercenary who ran roughshod over his tenants' rights. Christopher liked Cathy a lot, and her children were well-behaved and gentle, not what he was expecting in a family in such apparent distress. After the interview, he met with his faculty supervisor, Linda, to plan his strategy. After completing the research to which Linda directed him, Christopher developed an impressive strategy. He learned that the entire action against the Hunters could be dismissed because the Notice to Quit had not been served in the manner required by statute.¹¹⁷ If LeBlanc started over again after the dismissal, or if the dismissal motion was denied,¹¹⁸ Christopher discovered that he could win Cathy's

means of a written notice properly served upon the tenants before beginning an eviction case in court. MASS. GEN. L. ch. 186, § 12 (1994).

117. See MASS. GEN. L. ch. 186, § 12 (1994).

118. There was, Christopher realized, some substantial reason to forego a Motion to Dismiss and instead to save the faulty notice claim for trial. The Motion would be heard before the trial date if pled as such; the dismissal would then come sooner, rather than later. A motion to dismiss at trial would take advantage of the discovery delays and get the tenants a couple of weeks of delay longer. In Christopher's thinking about this consideration, he was advised to look at DR 7-102(A)(1) of the Model Code of Professional Responsibility (in effect in his state), which reads as follows:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, *delay a trial*, or take other action on behalf of his client when he knows or it is obvious that such action would serve *merely to harass or maliciously injure another*.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(1) (1981) (emphasis added).

Christopher's review of this provision did not persuade him that using the timing of the motion to leverage two more weeks for Cathy and her family would violate it, for he was not doing what he did to harass or maliciously injure LeBlanc. His only goal was to save his

case on the merits, for LeBlanc had not complied with several of his obligations. Christopher easily and reasonably could assert the following counterclaims: (1) violation of the security deposit statute, with a treble damages penalty (\$2,250) and attorney's fees,¹¹⁹ (2) interference with quiet enjoyment (the unauthorized entries), which allows a statutory three months' rent penalty and attorney's fees,¹²⁰ (3) breach of the implied warranty of habitability by maintaining an unsafe and unsanitary dwelling,¹²¹ (4) violation of the state's Consumer Protection Act by renting a dwelling that was not in compliance with state law, with possible treble damages and attorney's fees,¹²² and (5) retaliatory eviction, if one saw LeBlanc's action as evicting the Hunters for their lawful refusal to pay rent for a less than habitable dwelling, with three months' rent as a statutory penalty along with attorney's fees.¹²³

Christopher learned that Massachusetts has a statute which declares that if a tenant prevails on any counterclaim, she can retain possession of the rental unit.¹²⁴ While nervous about his ability to pull it off, Christopher was delighted that he could find a way to help this family so much. Indeed, he could demand as much as \$20,250 in damages, if all of the treble damages and statutory penalties of the counterclaims were aggregated.¹²⁵ Linda warned Christopher about the conservative nature of all district court judges,¹²⁶ in an effort to reality-test his judgments about what this case might be worth, but Christopher also knew that tenants in Massachusetts had an absolute right to appeal any judgment of the trial court, and have an entire trial *de novo* in superior

vulnerable clients from homelessness. A review of the comparable Model Rules did not alter that conclusion. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1983) ("A lawyer shall make reasonable efforts to expedite litigation *consistent with the interests of the client*") (emphasis added). The interests of Cathy were to gain as much time as possible.

119. MASS. GEN. L. ch. 186, § 15B (1994).

120. MASS. GEN. L. ch. 186, § 14 (1994).

121. See *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *McKenna v. Begin*, 325 N.E.2d 587 (Mass. App. Ct. 1975); MASS. GEN. L. ch. 239, § 8A (1994).

122. MASS. GEN. L. ch. 93A, § 9 (1994).

123. MASS. GEN. L. ch. 239, § 2A (1994); MASS. GEN. L. ch. 186, § 18 (1994).

124. MASS. GEN. L. ch. 239, § 8A (1994). If she owes money to the landlord after her successful counterclaim is offset against any rent due, the tenant must pay the difference within seven days if she wants to maintain possession. If the landlord owes the tenant money after offsetting counterclaims and rent claims, the tenant merely keeps possession. *Id.*

125. Christopher did the math in the following way: Security deposit (\$2250); quiet enjoyment (\$2250); retaliation (\$2250); habitability claim (50% of all rent owed or paid since inception of tenancy, for a total of \$4500); consumer protection act treble damages (\$4500 habitability damages times two additional, for a total of \$9000). These figures do not include possible attorney's fees.

126. See Bezdek, *supra* note 105, at 539 (providing examples of judges in Baltimore).

court,¹²⁷ where he understood that the judges were likely to be less jaded and more comfortable with figures like \$20,500.

This appeal, in fact, was Christopher's ace in the hole. If Linda was right that local district court judges were not favorably inclined toward tenants, all that meant was that Cathy would have a legitimate right to appeal the case. While the appeal was of right, and could take up to a year to complete,¹²⁸ Cathy would still be required to pay the fair market rent during that period, which could be a real problem if what she was looking for was free time (recall that as of now she could not pay the rent of \$750 while on AFDC, and her income was not likely to increase in the reasonable future).

However, Christopher was not without ideas about how to get around this serious problem. How much rent Cathy and her family would be required to pay during the appeal was a function of the condition of the apartment, and likely to be in dispute. The district court judges tended to use the contract rent as the chosen figure. But *that decision* was itself appealable¹²⁹ to the Superior Court, and perhaps even beyond that. Until there was a definitive ruling on the question of appropriate rent, Christopher might be able to get Cathy the ability to stay in the apartment rent free. While there were certainly limits on Christopher's ability to manipulate these procedural devices,¹³⁰ he was comfortable in his prediction that Cathy could live in her apartment at least for the next few months without paying any rent¹³¹ and without

127. MASS. GEN. L. ch. 239, § 5 (1994).

128. The "appeal" consists of a new trial in Superior Court. *See Kargman v. Superior Court*, 357 N.E.2d 300 (Mass. 1976). Once assigned to that court the summary process matter is entitled to priority on the "accelerated" list, *see* Standing Orders of the Superior Court, Standing Order 1-88, *in* MASSACHUSETTS RULES OF COURT 931, 934 (1995), which calls for assignment for hearing or trial within 180 days of filing. *Id.* at 933. The experience of practicing lawyers in the larger counties of Massachusetts, however, is that completion of the entire new trial proceeding in less than a year is unlikely, with the delays at the front end of the appeal, the congestion of the trial calendars, and the post-trial proceedings.

129. MASS. GEN. L. ch. 239, § 5 (1994).

130. The most significant potential limitation that Christopher faced in implementing this plan was the chance that judges and clerks would not follow the law as written. The plan described by Christopher followed state statutes and court rules carefully and literally, and assumed that judicial officials would do the same. Not all officials are so faithful to the law-in-the-books, and relief from or review of any inappropriate decisions is not always available, if the appellate-level officials also do not follow the rules. To legal theorists (and to law students exposed to the courts for the first time), this lawlessness may seem implausible or even shocking. To the legal realist practitioners, however, it is a not-uncommon occurrence.

131. Christopher understood that Cathy would *owe money* to the landlord for each month in which she lived in the apartment (depending on the amount offset by her counterclaims), but Christopher also understood that given Cathy's future financial prospects and current welfare status she was essentially "judgment-proof." Any judgment that LeBlanc might get against her

any fear of eviction.

There was, finally, one last real-world advantage to the Hunters that Christopher's research unearthed. Whenever LeBlanc obtained his eviction order from a court, whether sooner from the District Court, later from the Superior Court, or through some negotiated agreement, LeBlanc would have to finance the dispossession of the tenants from his unit. The cost of moving, and perhaps even packing, the tenants' belongings, and storing them for several months must be borne by the landlord,¹³² although the landlord does have a right, in theory, to seek recompense from the tenants through a separate civil action.¹³³ While this fact had some relevance to the plans of the Hunters, who knew that if they must move they would not forfeit their property, its greatest strength was in the negotiating leverage it offered Christopher with the landlord, whose costs even after a successful eviction could approach \$2,000.

Emboldened by his research results, Christopher called Cathy to tell her his belief that she had a pretty compelling case, and that the clinic would accept the matter for representation. Christopher wished to discuss the various options with Cathy and with Patrick before filing either his Motion to Dismiss or his Answer and Counterclaims. Christopher arranged to visit the Hunters at their apartment the next evening.

That visit to the apartment was one of two back-to-back events that caused Christopher to begin to have serious personal discomfort with his role in what otherwise was a model piece of clinic litigation.¹³⁴ The meeting was quite disenchanting to Christopher. The apartment that he had imagined as a tribute to slumlordism turned out to be quite nice. It was nicer, in fact, than the place he shared with his law school roommates. This did not mean that Cathy's claims were not

would survive for many years, but the likelihood of her actually paying even a small part of it was extremely slight. Therefore, any financial advantages that Christopher might leverage for her in the form of rent-free living or storage funded by the landlord translated into actual income for the Hunters.

132. See G. WARSHAW, MASSACHUSETTS LANDLORD-TENANT LAW §§ 8:8, 8:9, at 253-57 (1987).

133. But, of course, the tenants are unlikely ever to have to pay if they are judgment-proof. See *supra* note 131 and accompanying text.

134. Gary Bellow, among others, has observed that legal services lawyers all too frequently provide minimalist, slipshod, incomplete representation to their clients, and not the zealous, in-depth representation that Christopher anticipated here. See Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, NLADA BRIEFCASE, Aug. 1977, at 106. Whatever the strength of that empirical observation, clinical students working in legal services settings are less likely to feel the pressures (that full time legal aid lawyers experience) to provide shallow services.

true, for nice apartments could have mice and infrequent hot water, etc., but Christopher began to have doubts about Cathy's perspective on things. These doubts were more than encouraged by his reaction to Patrick, whom Christopher perceived as angry, manipulative, and less than honest. In talking to Patrick that evening Christopher just could not get Patrick's story to feel right, even though Patrick never altered the tale Cathy had first recounted. Proof of their story was weak or implausible or, at times, nonexistent. The Hunters had no receipts for the rent they claimed LeBlanc had failed to credit them. They had called the local Health Department on three separate occasions over the past year complaining about substandard conditions, but on each occasion the Health Department had found no violations at all, or only minor ones like chipped tiles in the bathroom. Patrick told Christopher that LeBlanc had the health inspectors "in his pocket," so the Hunters could never get a fair visit from them.

Patrick was very excited by what Christopher had told Cathy on the telephone about the case being strong. He had been in touch with the city's tenants' union, and he pressed Christopher about the counter-claims and the various treble damages awards that the Hunters might get. He knew about the appeal process and wanted to think through with Christopher just how long they could stay in the apartment without paying any rent. He hoped that they could play out the process long enough for Patrick's disability claim to be heard. If they had to leave earlier, they might be able to move in with Patrick's parents in their house in the next town. While there was room there, Patrick saw that as an absolute last alternative because his parents disapproved of some of Patrick's friends and would, as he described it, "always be on my case."

Christopher, with Linda assisting from time to time, explained to the Hunters his various theories, although neither mentioned the \$20,500 figure.¹³⁵ He agreed to think through with Linda the various ways to proceed, although Patrick expressed a preference for holding back the Motion to Dismiss to try for the greatest delay.¹³⁶

Soon after this meeting, a second sobering event occurred. With

135. See *supra* note 125 and accompanying text. Christopher and Linda discussed afterwards whether that omission was justifiable. Both agreed that the inherent unlikelihood of the Hunters ever seeing such an award, combined with their shared skepticism about the strength of the claims' merits after talking to Patrick, served as such a justification. But, each also admitted that the line between principled decision making and rationalization about that strategic choice was a fine one.

136. See *supra* note 118.

Linda's blessing,¹³⁷ Christopher called LeBlanc's lawyer, Jeannette Sinclair, ostensibly to begin negotiations and perhaps to learn something about LeBlanc's theory that might aid in Christopher's strategy. The conversation with Jeannette was extraordinarily depressing for Christopher. Jeannette was nice to Christopher, and seemed a principled, smart, and collaborative lawyer (to the extent that one can discern this from a single call¹³⁸). She also painted a picture of LeBlanc, and of the Hunters, that was very different from what Christopher had created for himself. LeBlanc was a married man with three children, working at a nearby computer company, who had purchased this three unit building as an investment. His mortgage payments on the building were a bit less than the income from the three units, and the Hunters' refusal to pay him was causing him not only severe financial distress, but serious personal health concerns as well. Jeannette painted the Hunters as unfortunate victims (neither party had planned on Patrick losing his job) who had turned on LeBlanc with a vengeance. They called his home repeatedly and harassed both LeBlanc and his wife, they called the Health Department again and again hoping to find a way to avoid liability for the back rent, and they kept threatening to bring claims against LeBlanc if he tried to evict them.

Christopher was at a loss about how to proceed in this telephone conversation. He did not (and felt he could not) disparage LeBlanc in return, but he did opt to lay out his legal claims in an effort to show Jeannette that the Hunters had grounds on which to stand. She responded to each. On the security deposit claim she possessed records showing that the deposit had been placed in the correct kind of bank account and that a receipt had been mailed to the Hunters; however, she now noticed, that receipt, like the notice to quit, seemed to have been sent to Apartment B, not the Hunters' Apartment A. Because the resident of Apartment B was the Hunters' friend, she did not view that misstep as of any substantive concern. She denied all of the other claims.¹³⁹ She did not wish to be unreasonable, though, and wanted to

137. Linda was a nondirective supervisor; Christopher did not as a rule get an "OK" from her before he acted. Still, he used her as a sounding board for his decisions, and he knew when she was approving of what he planned. See James H. Stark et al., *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L.J. 35 (1993).

138. See Gilson & Mnookin, *supra* note 108, at 539-40 (describing the plausible, if unlikely, tactic by which a gladiator will mimic a collaborator to sucker the opponent to cooperate and thus become vulnerable).

139. Regarding the habitability claims, she pointed to the Health Department records clearing her client, and also reported that LeBlanc had responded immediately to each complaint by the Hunters. He put down mouse traps but never found a mouse. The hot water

talk about a possible compromise. She offered to allow the Hunters three weeks to move. If they moved without LeBlanc's resort to the expensive constable, mover, and storage arrangement, LeBlanc would forgive all of the back rent. Christopher agreed only to discuss the offer with his clients.

With Linda present, Christopher met with Patrick and Cathy at the clinic office. The meeting did not go well. Patrick sensed Christopher's sympathies for LeBlanc and accused him of not siding with his own clients. Patrick said that Jeannette Sinclair was a liar and a slumlord lawyer who should not be believed. The documents to which she had referred in the telephone call, and which she had now faxed to Christopher for his review, were, Patrick pointed out, either irrelevant (the Health Department papers did not expressly rule out mice) or supported their claim (the security deposit papers were sent to the wrong address). Patrick did not see anything different between the last meeting and now; all of the counterclaims could still be filed, and all of the delays and procedural steps were still available. He wished to proceed as before. He could not afford to move in three weeks, so he needed to use the court for as much time as he could get. Cathy quietly agreed.¹⁴⁰

After the meeting, even though it was late, Christopher and Linda moved into her office to think all this through

I wish to end my story at this point.¹⁴¹ We leave Christopher

heater had malfunctioned for two days, but LeBlanc repaired that as soon as his plumber could get the part. LeBlanc did enter the apartment on two occasions with his key to respond to complaints left by the Hunters. On both occasions nobody answered his knock. Once nobody was home; the other time the Hunters were asleep, under the covers, in the fold-out couch. Seeing that LeBlanc apologized and left immediately. Finally, she had LeBlanc's rent books, and they showed that the Hunters indeed received credit for the free month's rent offered by the original bank representative; their rental history since was one of broken promises, partial payments, and bounced checks.

140. It is important for readers to understand that the description of procedural advantages available to tenants in court in Massachusetts, while literally accurate, does not represent the practice within courts in that state. All of the available evidence indicates that landlords evict tenants swiftly and effortlessly in Massachusetts. A recent survey showed that of 375 summary process cases tracked, 75% of cases reached final judgment within 20 days of entry, landlords were awarded possession in 80% of the cases, and only 2.4% of all cases were appealed. Mass. Law Reform Institute, Unpublished Study (1995) (on file with author). *See also* Bezdek, *supra* note 105, at 553-57 (similar findings within Baltimore's courts).

141. Despite my career-long work with tenants in distress, I have intended in this story to portray tenants of questionable integrity. Unlike a recent story told by Homer La Rue, my story presents tenants whose motives are mixed and whose character is at least subject to question. *Compare* La Rue, *supra* note 105, at 1153 (describing representation of a very honorable

and Linda in a state of some moral ambiguity.¹⁴² The conversation they are about to begin may be informed by the notions of morally activist lawyering Linda might have tried to teach in the clinic, or that Christopher might have encountered in his professional responsibility course. Let us assume that each has read the central Simon and Luban works, Linda perhaps more closely than Christopher. Their conversation, and its various possibilities, is explored in the following Part.

IV. WORKING WITHIN AN ACTIVIST CONCEPTION

A. THE TRADITIONAL PERSPECTIVE CONTRASTED

If Christopher had never heard of David Luban, Richard Wasserstrom, or William Simon, or (put another way) if he had gone to law school in the mid-1970s, his assessment of this case might be straightforward, if painful. Without an activist view Christopher succumbs to the "arguably legal," nonaccountable, standard conception. His professional role demands that, while acting as the Hunters' lawyer, he represent them zealously within the bounds of the law. As long as he remains within those bounds, he has done nothing improper. If someone, whether Jeannette Sinclair, Carl LeBlanc, the local judge, a curious reporter, or a friend, should press Christopher about how he can do what he is doing for these tenants, he has an answer: "It's my job. Because everything I do here is legal, I must do it if my clients ask. I don't judge them, but you may." His clients will feel defended and supported, and Christopher would perhaps get high marks within his clinical program for clever and ambitious case planning and advocacy.

tenant). Not only do I encounter such individuals on occasion in my practice, but the questions about their character are essential to the moral struggle Christopher has experienced.

142. The only possible argument that there is *no* moral ambiguity in this story would come from the left. I need to explain why that is so. An argument against ambiguity from the right would have to say that these tenants could not possibly have moral claims against this landlord, an argument which if accepted leaves the activist lawyer in a real role conflict (for part of her role says "defend zealously," but her unambiguous moral self says "don't touch this case"). So, from that perspective there is a professional moral dilemma even if the moral assessment of the tenants' actions is unambiguous. The argument from the left would say that the tenants cannot possibly be blamed for their actions, given historical and structural forces that require powerless and vulnerable persons like the Hunters to play these kinds of games merely to maintain a roof over their heads. Accepting that view takes away any moral/professional tension, for the traditional and the activist agendas join forces, and the lawyer suffers no role uncertainty. I think the argument from the left is a powerful one, but I cannot acknowledge that it is an *unambiguous* one, especially among practicing lawyers and law students. This inherent slipperiness about moral content captures an important point about some parts of the activist regime: they rely on the good faith moral judgments of folks who will disagree frequently.

In this way, the traditional view is straightforward. This stance also will tend to aid poor clients of the clinic more than an activist view would,¹⁴³ at least identified, individual clients.¹⁴⁴ But it is painful, and may be morally corrupt. The conversation between Christopher and Linda in her office cannot proceed very far if both adhere to the standard conception. That conception permits two responses to moral ambiguity or tension, withdrawal or moral conversation, but it is important to recognize that each of these responses is discouraged by the standard conception because of its nonaccountability component.¹⁴⁵ Withdrawal as a response to moral tension will be difficult.¹⁴⁶ Espe-

143. While my reading of some of the activist proposals below shows that one might read them as permitting full advocacy here, *see infra* notes 62-97 and accompanying text, my point remains that with activism one might or might not follow one's clients' instructions in a case like ours, but with traditionalism one always follows those wishes. Homer La Rue, although not arguing for the traditional view of lawyering, shows how zeal for one's client might create an empathy that a more judgmental perspective would discourage. *See* La Rue, *supra* note 105, at 1155 ("The student noticed how his own desire to 'win' pushed him to identify with his client in a way that permitted him to experience, if only for a moment, the powerlessness of a person who lives her life in a state of subordination.")

144. *See infra* notes 196-98 and accompanying text for a discussion of the way in which an activist conception might be justified on the basis of the benefits it offers to a client community, or to poor constituents more generally.

145. Defenders of the standard conception argue that it incorporates moral sensitivity in its encouragement of lawyer discussion of nonlegal considerations and in its permissive withdrawal options. *See* Stier, *supra* note 39, at 596-98; Pepper, *Amoral Role*, *supra* note 36, at 630-33. But neither of these characteristics of the standard conception survives well the nonaccountability principle. As the discussion in the text shows, both measures presuppose some moral dissonance within the lawyer; if she is trained by the nonaccountability lesson not to perceive moral dissonance, her need to engage in the (frequently) painful process of moral dialogue or abandonment is considerably lessened.

146. *See* Ellmann, *Lawyering for Justice*, *supra* note 22, at 122 (discussing withdrawal as a remedy for discomfort).

Depending upon the jurisdiction, Christopher may be permitted to cease representation of the Hunters even under the standard conception. The Model Code, which applies in his state, permits withdrawal if his client "renders it unreasonably difficult for the lawyer to carry out his employment effectively." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C)(1)(d) (1981). The Model Code also permits withdrawal where the client "insists . . . that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules." *Id.* at DR 2-110(C)(1)(e). This seems to fit Christopher's quandary perfectly, but that discretion exists only "in a matter not pending before a tribunal." *Id.* This limitation implies that in litigation a lawyer may not abandon individuals who insist upon conduct contrary to the lawyer's judgment.

The Model Rules generally offer greater freedom for lawyers to withdraw from representation, but a close reading of Model Rule 1.16 leaves some question about whether Christopher could withdraw here. Rule 1.16(b) permits withdrawal either "if withdrawal can be accomplished without material adverse effect on the interests of the client" (which cannot be satisfied here), or if "(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983). Whether this applies turns on one's read of the term "objective." The Hunters' primary objective is to

cially in the legal services context, the option is such a drastic one that it ought to be quite rare.¹⁴⁷ It is also harder to justify withdrawal under a traditional regime. Consider the perspective of the advocate for tenants: "Why abandon tenants with good legal claims when your profession allows you to represent them without moral sanction?" There are answers to that challenge, but my point is that the answers flow less easily in a regime committed to the standard conception.

Even as dedicated traditionalists, Christopher and Linda may also consider the role of moral dialogue with the Hunters.¹⁴⁸ As noted earlier,¹⁴⁹ the professed amorality of the advocate role makes this process less plausible than it would be within an activist realm. Still, there are few principled (as opposed to comfort-related) reasons to dismiss this suggestion. One might argue that in the case of the Hunters, facing homelessness and convinced that their landlord has violated their rights, such deliberation is apt to be unproductive, but there are important reasons not to treat it so dismissively.¹⁵⁰ If that process fails to alter

avoid homelessness, which I take not to be imprudent even to Christopher; but their more focused objective (reading the facts most unfavorably) is to manipulate the procedural rules to force the landlord to subsidize their housing for as many months as possible, which I shall assume is repugnant to Christopher.

147. The clinic in which Christopher works is the "last lawyer in town" for eligible persons, unless they can afford to hire counsel out of the private market, which of course is never likely. Refusing to continue with the case, even if permitted under the Model Code, would amount to a denial of the "right" of the Hunters to assert their claims and defenses, and would lead directly to a quicker eviction.

148. Moral dialogue is of course permitted under existing norms. See Margulies, *Interests of Nonclients*, *supra* note 25, at 223-27. Standard conception defenders rely on that measure to supply the moral element to adversary system practice. See Pepper, *Amoral Role*, *supra* note 36, at 630-32; Stier, *supra* note 39, at 596; cf. Griffin, *supra* note 1, at 228. See also Loder, *supra* note 52 (proposing dialogue as a means to reincorporate moral considerations into lawyering); Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759, 1759 (1993) (deliberation with clients about ends and means is the most important virtue lawyers can possess). But see Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 57 (1991) (disagreeing from the traditionalist perspective with William Simon's version of moral dialogue with clients); Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71, 72 (1991) (disagreeing from a traditionalist perspective with any suggestion of moral dialogue with clients); GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 147-48 (1978) (discouraging "incorporating morals or policy into [a lawyer's] advice").

149. See *supra* note 145 and accompanying text.

150. One obvious potential benefit of such deliberation is the prospect that the lawyers' beliefs about the moral quality of the Hunters' tactics might change. See Gutmann, *supra* note 148, at 1764 (lawyers have no comparative advantage over "other thoughtful people" about social justice); Margulies, *Civic Republican View*, *supra* note 60, at 702-03 (client narratives' possibility to effect changes in student attitudes); David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 471 (1994); LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 174. Even if the lawyers' conceptions of the moral fabric of the case is not changed by the dialogue, there is some potential that the

the moral landscape in any significant way, however, under the standard conception the lawyer's only option will be to proceed.

B. THE ACTIVIST PERSPECTIVES

1. "Opting In" as an Activist

My argument in the last section has been that a traditionalist, a neutral partisan, will perceive his obligation to be to defend the Hunters with all "arguably legal" means. I have constructed the case in such a way that all of Christopher's original tactics remain "arguably legal,"¹⁵¹ but are morally troublesome. The standard conception has little place, though, for Christopher's moral concerns. The emerging morally activist lawyering conception, however, purports to offer just such a place. As it is no longer the 1970s, Christopher and Linda have available to them a melange of ideas from the productive philosophers, all suggesting that the tension between Christopher's professional role demands and his personal integrity ought to be addressed in a way in which the integrity element is not so easily sacrificed.

Let us assume that Christopher and Linda know about the emerging literature. Christopher has read, as part of his clinical course, excerpts from works by Wasserstrom, Simon, and Luban, and opposing views by Pepper and Fried; Linda has read a bit more, including some of the essays from *The Good Lawyer* and Rob Atkinson's comprehensive critique of this movement. Let us also assume that each feels some moral difficulty with the Hunters' case as it has developed. It is at this moment that the first of the "expertise" questions arises for this student and his supervisor.

Because their world is more rich, and more multifaceted, than it would have been in, say, 1974, they have available what might be considered *choices* about how to orient their professional lives at this moment. But the choices are controversial and the subject of expert dis-

clients will be open to reconsideration of their tactics if their safety and shelter needs can be met through some creative problem solving. See, e.g., Shaffer, *Moral Discourse*, *supra* note 27, at 244-45 (lawyers frequently underestimate clients' concern for fairness).

151. I believe that position is defensible. None of Patrick's claims or Christopher's early tactical ideas are conclusively ruled out by Jeannette Sinclair's responses. The landlord has made certain technical errors in his processing of the relevant documents; discovery is a perfectly legal method of ascertaining whether what Jeannette has said is true and has adequate evidentiary support; and, *some* factual questions are likely to remain after trial that could warrant an appeal.

agreement. Some very articulate and thoughtful philosophers argue that a neutral partisan attitude at this moment is a morally superior stance; other equally articulate and thoughtful philosophers, marshaling different strands of moral philosophy, disagree, arguing that the neutral partisan stance sanctions a good deal of immoral behavior. And, among those latter adherents, some favor a certain model of "activism," while others support differing models. Indeed, the more that Linda and Christopher know about these choices, the less clear it becomes how to decide among them, if in fact "choosing" is the apt label for this process.

I think it should become clear that "choosing" in fact is *not* the most apt description of Christopher's experience as he reacts to the Hunter tension. For the moment, though, I want to maintain that metaphor. If we could break down his moral thought process at this juncture, there appears to be two parts to this moral calculus. First, does he opt for a traditional stance, or an activist one? If I am correct that there are differences between these two universes, then it is not illogical to think of lawyers as falling into one "camp" or the other.¹⁵² If Christopher is a traditionalist, and if my assessment of the standard conception is reliable, then he proceeds as I described above, which means essentially litigating this "arguably legal" defense. If he is not a traditionalist, but instead is an activist, then his second decision point arises: which of the activist arguments does he accept, and which does he reject? If I am correct that there are cognizable differences among the activists, then it is not illogical to expect that those differences will affect the practice experience (or, equally relevantly, the moral assessment) of the resulting lawyering.

Two things seem to be true at this point in the argument. One is that Christopher most likely will not perform (and will not have done so in the recent past) a philosophical investigation and analysis of the competing theories, judging then one to be superior, before acting. The

152. While most moral philosophers identify as members of the teleological or the deontological schools, *see, e.g.*, FRANKENA, *supra* note 9, at 14-17 (describing adherents from each side), one frequently finds, in contemporary ethics literature, writers borrowing from both theories. *See, e.g.*, VIRGINIA HELD, RIGHTS AND GOODS 111-12 (1984) (proposing teleological reasoning for politics and deontological for law); Luban, *Mid-Course Corrections*, *supra* note 20, at 425-43 (employing both kinds of reasoning in his assessment of the adversary system's justification); ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING 300-02 (1988) (describing the overlap between the two theories); TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 55, 100-01 (4th ed. 1994) (describing ethical decision making models that borrow from several philosophical theories).

second is that Christopher *will act* in some way on this case, a way which in hindsight will be describable as consonant with one or another of the philosophical theories. That is to say, he cannot (unless he is a rare law student) resolve the philosophers' debates, but he will have to act as though he has done so, at least provisionally and at least for his conception of his career at this moment. These observations are apt to apply to *both* of the two hypothesized decision points that I have described: whether to be an activist, and (if chosen) what kind of activist to be. But, as I alluded to above, it is unfair to refer to these as *choices*, for that may accord an overstated sense of deliberative judgment to this process. It is more likely that Christopher will search in some imperfect, "satisficing"¹⁵³ way to reconcile his moral beliefs, his legal obligations, and his personal reactions to his clients and their case. What looks like a series of decision points might instead be a complex blend of tactical and ethical sentiments.

If my description is accurate, then the philosophers' richly textured arguments are nearly beside the point for Christopher's proceeding on this case, except as follows. The arguments, whether richly textured or not, are critically important in affording an intellectually pedigreed justification for the *initial orientation* that Christopher will already hope to follow. It ought to be easier to be morally activist in 1995 than in 1974, thanks to Luban, Simon, Wasserstrom, etc. In addition, the arguments, and here preferably richly textured ones, will aid Christopher in his post hoc defense for what he opts to do within his morally ambiguous professional experience. Differing activist conceptions can justify different lawyering postures, and my best guess is that, once the abandonment of the standard conception is accomplished, the differences among the activist experts are more valuable after the fact than as principled direction *ex ante* for one posture among several choices.

153. "Satisficing" is a term capturing an attempt to do one's best amid pressures and circumstances that do not allow for perfect processing of information. The term is attributed to Herbert Simon. See HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR xxviii-xxxi, at 38-41 (1976); see also HERBERT A. SIMON, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 502-03 (1979); Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 332 (1994).

2. Within the Activist World: The Three Models Applied

Earlier I described the three most prominent available activist “models”: Luban’s morality-driven stance, Simon’s “purposivist” model, and Simon’s “justice”-based conception.¹⁵⁴ While I have just argued that the link between the philosophical arguments separating the activist models and one’s choice of a model as a practicing lawyer is at best tentative, it is important to proceed to compare some of the practice implications for each model. Whether I am right or not about *how* one comes to be (even for a moment) a “Simonist” or a “Lubanite,” the differing models are prominently out there, and how they might be applied is of some importance to those who wish to understand and to refine the activist endeavor. Let us, then, apply these activist ideas to Christopher’s current predicament.

a) Luban’s Morality-Driven Thesis

Consider first Luban’s stance, tied as it is to a conception of ordinary morality. Luban suggests a rather concrete deliberative method that lawyers might use when confronting role conflict.¹⁵⁵ He offers the following seven-step method he claims lawyers can apply to assess the justifiability of any morally troubling action:

1. Identifying the institution, the role, the role obligation and the role act.
2. Assessing the institution, role, and role obligation in the light of the ends they are to serve.
3. Applying the minimum-threshold test: determining whether, at each link, the credits and debits indicate that the entity (institution, role, role obligation, role act) is justified.
4. Applying the cumulative-weight test: determining the total significance of the various policy arguments to the role act.
5. Assessing the relevance of the policy arguments to the case at hand.
6. Resolving the dilemma by weighing the justification of the role act against the moral offense of performing it.
7. Acting.¹⁵⁶

154. See *supra* notes 73-97.

155. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 139-40.

156. *Id.* at 140. Luban rejects the expected objection that this deliberative process “seems like a lot to ask” for lawyers, especially in routine, unexciting matters such as “a lousy four-bill landlord-tenant case.” *Id.* His response, that “[w]hat looks to be hopelessly complex is not so bad in real life,” stresses that this deliberative process need not be repeated in full each time a lawyer confronts a moral controversy; for this lawyer, once she has thought through the implications of the role justification in some depth, “[t]he only deliberative acts that must be

The seven-step process measures the competing justifications of the institution that asks for role-adherence and the demands of ordinary morality. Five steps judge the strength of the commitment to which the institution is entitled, one step compares the institutional justifications to the moral offense at hand, and the seventh step is the decision point: "acting." But Luban's analysis is only useful, of course, if one can determine *ex ante* that the lawyer in question is asked to perform a "moral offense." That question is not addressed by Luban, except obliquely.¹⁵⁷ His oblique answer is, essentially, that we ought to know moral difficulty when we see it.

Returning to our student and supervisor, Christopher does see moral conflict here. He believes strongly that Luban's *ex ante* requirement is met, and in his conversation with Linda he is ready to apply the seven-step test. Christopher's assessment concludes that he ought not advocate zealously for these clients. Relying on Luban's persuasive arguments,¹⁵⁸ Christopher finds only weak justifications for his institutional role obligations. The moral harm to LeBlanc, by contrast, is substantial. On balance, this looks like the time for activism. Christopher is not clear, exactly, what activism will mean in this case, but he is confident that he ought not employ the usual, standard lawyering tactics here, even though his clients want it (and would benefit by it).

Linda shares Christopher's uncertainty about what activism might mean in this case, but she has a more fundamental question about whether the case fits the activism conception at all. She wants to know more about Christopher's reactions to the case. Why, she inquires, does Christopher feel so strongly that he is being asked to commit a "moral offense"? Christopher is articulate about that: he has been raised in a household (indeed, in a culture) which values self-reliance and responsibility. Christopher does not believe that Patrick has any moral right, even if one could squeeze out a legal right, to live off the sweat of Carl LeBlanc, which is the effect of prolonging the Hunters' tenancy. Christopher recalls from his ethics textbook a compelling argument from Kant that one should never use another person merely as a means

performed on the spot are those needed to bring these rather abstract assessments to bear on the dilemma at hand." *Id.* at 141.

157. See Luban, *Partisanship, Autonomy and Betrayal*, *supra* note 22, at 1023-25 (responding to Ellmann's complaint that moral questions are relative by insisting that most of us recognize basic moral truths).

158. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 116-19; Luban, *Adversary System Excuse*, *supra* note 41, at 93-117.

to an end.¹⁵⁹ That is what he sees going on here. Furthermore, Patrick's anger, his apparent dishonesty, and his manipulateness all support the strong reaction that Christopher is being asked to help a malingerer and to serve as an "enabler" to Patrick's efforts for hand-outs.

Linda finds this conversation heartening but incomplete. She is encouraged that Christopher is willing to acknowledge the moral complexity of lawyer role; she sees too many lawyers practicing in law firms and elsewhere who unthinkingly subscribe to the amorality and nonaccountability traditionalists have so long taught. Studying Luban and Simon in the clinic might have made a difference in Christopher's outlook as a lawyer. But Linda is, at the same time, not entirely satisfied with Christopher's moral assessment of Patrick. Patrick annoys her, too, but she sees a bigger picture here, with a historical framework that helps her to understand why some families end up like the Hunters. Indeed, her resolution of the moral conflict might well be different from Christopher's. Are the Hunters angry? Yes, but anger is not an inappropriate reaction to feelings of helplessness and oppression. But are the Hunters really "oppressed"? This is much harder for Linda to sort out, but she knows that Patrick's inability to make ends meet through his blue-collar, unskilled employment is connected somehow to much larger economic forces, and that the family's welfare benefits are insufficient to allow them to live in private housing.¹⁶⁰ She might agree with Christopher that Patrick is exaggerating his disability claim (although she is more willing than Christopher to suspend judgment¹⁶¹), yet she is open to see that as Patrick's effort to maintain

159. Immanuel Kant, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 46 (Lewis W. Beck trans., 2d ed. 1990) quoted in RHODE, PERVASIVE METHOD, *supra* note 24, at 24 n.40 (1994).

160. It is well accepted within politically progressive circles that poverty is the result of a complex combination of political and economic structural forces. That view assigns less "blame" to the victims of poverty. For discussion of some of the literature in this vein, see Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 660 (1987-88); Joel Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987-88) [hereinafter Handler, *Transformation of Aid*]; Jack Katz, *Caste, Class, and Counsel for the Poor*, 1985 AM. B. FOUND. RES. J. 251 (1985); Peter Margulies, *Representing Domestic Violence Survivors as a New Paradigm of Poverty Law: Towards Access, Connection, and Voice*, 63 GEO. WASH. L. REV. (forthcoming 1996) (asserting the connection between poverty and gender); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991); JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* (1991); MICHAEL B. KATZ, *POVERTY AND POLICY IN AMERICAN HISTORY* (1983).

161. For an elaborate discussion of the connection between poverty and disability, and the

some form of income for his family. Her view is that this family may be less "free," less "responsible," and less blameworthy than her student perceives.¹⁶²

If her interpretation is right, Linda is still quite stuck about the moral balance involved in the choices surrounding whether to exploit court procedures. The Hunters' gain comes at LeBlanc's expense, and she does not share the Hunters' low opinion of LeBlanc. He seems to have been patient and reasonable, if not perfect, as a landlord. But LeBlanc's possible innocence does not end things for Linda. She wants to compare his financial sacrifice to the effect of homelessness on the Hunters.¹⁶³ She is able to articulate a way in which less harm would occur if the clinic went all out for these tenants, giving them some time to relocate even if this comes at the landlord's expense. Linda also can see a "rule-consequentialist" perspective here, which might favor zealous advocacy for tenants as a policy even if in some instances the balance of harms seems unfair.¹⁶⁴

social construction of the latter, see Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992).

162. For a discussion of personal responsibility and poverty, see Ross, *supra* note 160, at 1499 ("Poor people are different from us. Most of them are morally weak and undeserving. And, in any event, we are helpless to solve the complex and daunting problem of poverty. This is the rhetoric of poverty."); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA at xi-xii (1986); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 883-88 (1992) (describing stories of the "worthy" poor and the interplay of state and economic forces in the creation of poverty); Handler, *Transformation of Aid*, *supra* note 160, at 468-69.

163. For a discussion of the harms of homelessness, and the relationship between economic forces and shortage of housing, see, e.g., MICHAEL H. LANG, HOMELESSNESS AMID AFFLUENCE: STRUCTURE AND PARADOX IN THE AMERICAN POLITICAL ECONOMY 15-19 (1989); DOUG A. TIMMER, ET AL., PATHS TO HOMELESSNESS: EXTREME POVERTY AND THE URBAN HOUSING CRISIS 14-15, 18-30 (1994); Lucie E. White, *Representing "The Real Deal"*, 45 U. MIAMI L. REV. 271, 281-91 (1990-91); Curtis J. Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 317-24 (1990-91); Nancy Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. L. & SOC. CHANGE 565, 567 (1988-89) (developing the connection between insufficient welfare grant levels and increasing homelessness).

164. Linda's rule-consequential argument might proceed as follows: Poverty lawyers as a rule ought to defend tenants vigorously and with full zeal, regardless of the particular circumstances, as a means of protecting tenants' rights. The rule is necessary because: (a) landlords are on the whole more powerful and repeat players in the court system, and the added "cost" of an eviction created by reliable opposition helps to dissuade or deter landlords from evicting tenants except in the most serious cases; (b) judges on the whole favor landlords, so reliable opposition levels the playing field; and (c) tenant advocates are vulnerable to opponents' arguments alleging abuse of their power, both ideologically and because of funding pressures, and a rule which converts to a professional ethic serves as a defense to exploitation of that vulnerability.

She wants to explore this with Christopher, but two things interfere. The first is time. It's almost eight o'clock, and Christopher has important decisions to make soon. A thorough exploration of the structural underpinnings of poverty would take months, perhaps years. Her other concern is a mixture of her need to appreciate and nurture moral autonomy and integrity, and a fear of discouraging Christopher's moral commitments by seeming to wish to alter them in a way that, to Christopher at least, would have some relationship to her politically liberal views. She worries that her efforts to expand Christopher's moral horizons will communicate to him that moral activism is appreciated only if it serves certain ends. She wants, indeed needs, to avoid that message. Finally, despite her own differing vision, Linda is not *sure* that Christopher is wrong about the implications of this particular case, given LeBlanc's needs and circumstances. She and Christopher might disagree about the moral implications here, but this is not the case where she is persuaded that her judgments are unalterably sound.

From this eavesdropping on Christopher and Linda, we can observe some necessary implications of the Luban model, including: (1) the reliance within the model on the decisionmaker's moral analysis "skill" and (2) the politically conservative effects of the model. Each of these deserves further exploration.

(i) The Talent/Skill Question

Unlike Simon, who recommends what some might term more objective¹⁶⁵ legal standards by which to assess a lawyer's special responsibilities, Luban relies upon a common morality not easily separated from complicated political and personal conceptions about fact and value. In the Hunters' example, Christopher will use the Luban formula to resist aiding these tenants. Linda, applying the same standard, might find her role obligations justified in this case. Linda's thinking might be more "sophisticated" than Christopher's. She has a

Note that these reasons, even if persuasive, are not premised upon the traditional reasons underlying zealous advocacy under the standard conception. They emerge from a recognition of power differences within the housing market and the eviction bar, and thus may be justified there even if not justified for lawyers generally.

165. I use the word "objective" here to capture a sense of shared processes of analysis, understanding full well its dangers. The argument that legal merit possesses a greater shared language and content than moral merit, while perhaps commonly believed, is controversial. For support of this proposition, see Simon, *Ethical Discretion*, *supra* note 23, at 1120-23; Pepper, *Counseling*, *supra* note 51, at 1579. GOLDMAN, *supra* note 19, at 91. For the opposing view, see Atkinson, *supra* note 25, at 870-71, 889-947 (claiming that Luban's morality criterion and Simon's legal merit criterion are equally susceptible to individual biases and preference).

broader view of historical and political consequences than does Christopher, she understands better than her student the subtleties of the activist scholarship, plus (and whether this counts is a very open question) she has a somewhat better working knowledge of moral philosophy. If the Luban model cares about that expertise, it would have to account for the relative lack of expertise among those who will be using it.¹⁶⁶

My sense is that a model such as Luban's *must* care about the skill of moral analysis, but at the same time it cannot care about it too deeply. It must care because this model's development emerges from sophisticated argument about the quality of moral reasoning.¹⁶⁷ It is difficult to argue that there are not better and worse moral deliberative efforts. The "better" efforts surely must deserve some preference within the model. But Luban's thesis rests a great deal of, and perhaps sole, discretion with ordinary lawyers. The available literature indicates that lawyers do not possess any special moral acumen,¹⁶⁸ and that law school has not been very effective in developing that skill.¹⁶⁹ The

166. For a sampling of the literature on the relationship between ethical expertise and ordinary moral decision making, see, e.g., MacIntyre, *supra* note 2; E. Haavi Morreim, *Philosophy Lessons from the Clinical Setting: Seven Sayings that Used to Annoy Me*, 7 THEORETICAL MED. 47 (1986); Loretta M. Kopelman, *What Is Applied About "Applied" Philosophy?*, 15 J. MED. & PHIL. 199 (1990); Larry R. Churchill & Alan W. Cross, *Moralist, Technician, Sophist, Teacher/Learner: Reflections on the Ethicist in the Clinical Setting*, 7 THEORETICAL MED. 3 (1986); Francoise Baylis, *Persons with Moral Expertise and Moral Experts: Wherein Lies the Difference?*, in CLINICAL ETHICS: THEORY AND PRACTICE 89 (Barry Hoffmaster et al. eds., 1989). I have begun exploring that topic in my research into the field of clinical ethics in medicine and law. For my preliminary thoughts about this matter see Paul R. Tremblay, *The Role of Casuistry in Legal Ethics: A Tentative Inquiry*, 1 CLINICAL L. REV. 493 (1994).

The difference in skill level between practicing lawyers and moral philosophers may encourage the use of the ethics committee in law settings. On the use of ethics committees in medicine, see, e.g., John C. Fletcher, *The Bioethics Movement and Hospital Ethics Committee*, 50 MD. L. REV. 859 (1991); JUDITH W. ROSS ET AL., HANDBOOK FOR HOSPITAL ETHICS COMMITTEES (1986).

167. I refer here, of course, to the rich literature developing the activist view. See also Luban, *Radical Communitarianism*, *supra* note 29, at 591-92 (defending Shaffer's "second moral order," encompassing "reflection, decision, and defense," by which one's character is supplemented by reasoned and reflective analysis of moral considerations).

168. Loder, *Moral Skepticism*, *supra* note 52, at 56.

169. See, e.g., CHRISTOPHER F. MOONEY, PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION 67 (1986) (stating that all professionalization "tends to produce 'minds in a groove'" and diminished sensitivity); Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514 (1978); Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3 (1991) (noting that Roger Cramton's 1978 vision of law schools producing unreflective, amoral, instrumental lawyers remains the norm in 1991); Sanford Levinson, *Identifying the Jewish Lawyer*, 14 CARDOZO L. REV. 1577, 1601 (1993); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993) (lamenting law schools' inability

concern is that increased lawyer discretion on matters of moral conflict poses a danger to the extent that lawyers possess inadequate moral sensibilities.

There are several responses to this concern. The first is visionary. It posits that an increased concern among lawyers for moral considerations within lawyering, encouraged by the Luban perspective, will transform ethics instruction in law schools.¹⁷⁰ The standard conception does not contemplate sophisticated moral inquiry, given its simplified moral world. A Luban-inspired alternative orientation would demand attention to complex moral questions. That focus can be expected to change the conversations within law schools. This response, then, might accept some short-term difficulties with long-range optimism.¹⁷¹

The second response is more pragmatic. It points out that even in the hands of less-than-sophisticated lawyers, the activist approach is worth the risks. Indeed, the argument asserts, it is unlikely that there will even *be* much "down-side" risk. In most ethically-charged circumstances, it is likely there is little harm at stake in diverging from the standard conception. The worst that can be expected is conformance to the standard conception more frequently than might be warranted, but that "harm" is hardly a cost of adopting the activist view. To be more explicit, outside of the poverty law setting (an important qualification, addressed just below) most ethical conflict will consist of clients who wield some power causing some (arguably legal) harm to a relatively sympathetic or innocent third party.¹⁷² This description captures the

to inculcate social values within Black law students).

170. See Gordon & Simon, *supra* note 108, at 236-40 (condemning rules-based focus of legal ethics instruction at the expense of developing reflective abilities); Steven Hartwell, *Promoting Moral Development through Experiential Teaching*, 1 CLINICAL L. REV. 505, 530-32 (1995) (concluding after empirical study that experiential and in-role ethics training leads to a higher stage of moral reasoning as measured by Kohlberg instruments).

171. As with most of the themes developed here, this point assumes that traditional nonaccountability discourages moral reflection, while activism, by overruling the accountability demurrer, encourages such reflection. This assumption is central within the activist literature. In addition to the activist works already cited see Chemerinsky, *supra* note 25.

There is a risk, though (as Reed Loder points out to me), that with the Luban-inspired activism premised on "ordinary morality" the moral conversations may not be as rich as one might desire. A prevailing sense of relativism may cut off conversation among persons whose ideas of "ordinary morality" differ, as each feels that moral opinions are personal and not subject to debate. For a fuller elaboration of these concerns, see Loder, *Moral Skepticism*, *supra* note 52.

172. See SHAFFER & COCHRAN, *supra* note 27, at 3 (describing the "most common moral issue that arises in law practice" as "whether the lawyer and the client should take actions that will work to the disadvantage of other people"). I add in the element of client "power" to capture the real tension the lawyer will face in thinking about resisting the client.

paradigmatic activist concern. Let us assume that a sophisticated moral activist will be able to weigh the moral concerns in an intelligent way, and that in some cases the result of that assessment will be refusal to aid the client (or perhaps even betrayal of the client's goals¹⁷³). The crude¹⁷⁴ moral activist misses the nuances, or relies upon blunt, or stereotypical, or self-interested considerations. Her crude approach invites opposing dangers: she may refuse to aid (or may betray) her client when inappropriate (Danger #1); or she may go along with her client when a more sophisticated approach would refuse aid (Danger #2). We immediately see that Danger #2 is not a risk or disadvantage of the activist orientation; it is just as though the crude activist were a traditionalist.¹⁷⁵ There is no "harm" in choosing to be an activist as opposed to a traditionalist if Danger #2 is the fear. So the real risk is Danger #1, the risk that Linda saw with Christopher. We do not want crude activists inappropriately sabotaging their clients' goals. The standard conception, for its part, eliminates this risk.

But, is Danger #1 a real danger outside of poverty law circles? I suggest it is not. Both economics and politics support my supposition. The economics argument is easy. Lawyers will not too frequently betray the clients upon whom they depend for their livelihood. This same argument, of course, minimizes the strengths of the activist view, but it does not eliminate them. The crude activist will benefit from the accountability thesis in cases of extreme moral conflict. Given its message of responsibility for her actions, she will find it more difficult to support serious (if lawful) client wrongdoing. The political argument is less easily articulated, but seems plausible. The question is whether a crude activist will tend to err on the side of supporting, or objecting to, the wrongdoing of powerful clients. Because of prevailing ideology, cognitive dissonance, or political culture, it seems safe to predict that, more often than not, less reflective activists will share in prevailing American biases about the rights of those with privilege to exercise their privilege. This argument may be controversial (although I frankly doubt it) and needs more support than I have space for here, but if it

173. See Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 22, at 1022-23, 1026.

174. I borrow the "crude" versus "refined" labels from William Simon's discussion of autonomy and paternalism. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 222-26 (1991).

175. My assumption here is that a traditionalist will support her client's goals as long as they are legal, and will not engage in the second-guessing or moral assessments that an activist would. See, e.g., FREEDMAN, *supra* note 37, at 57. While the traditionalist/activist dividing line may not always be precise, my somewhat stark contrasts here serve to highlight the differences between the orientations.

is true it minimizes considerably the risks of activism outside of the circumstances of less-powerful clients.

(ii) The Question of Harm to Weaker Clients

If I am correct that even in a world of inexpert ethical analysts we face few risks with adoption of the morally activist conception in those private practice settings where clients have some power, what about the rest of the profession? I wish to focus here on the poverty law setting, where I see that morally activist lawyering poses some greater risks.¹⁷⁶

My initial point is simple. Morally activist lawyering generally is not a friendly development for instrumental poverty law practice. This is nothing more than a truism: moral activism is unfriendly to *all* instrumental practice, by its very definition, so naturally poverty law settings are no exception. But the point may be elaborated with two more nuanced and significant observations: moral activism in its crude form is especially dangerous for poverty law practice and moral activism in its refined form may begin to conflate with the standard conception in the context of poor clients.

I first address crude activism with poor clients. Consider legal services practice. As noted above, there *are* indeed greater risks of harm to those clients than with powerful clients. The economic and political incentives that operate to minimize the risk of overreaching and inappropriate betrayal in the private sector do not exist, or appear in much more diffuse form, in subsidized practice. One might respond that this risk is minimized not by the usual factors, but by the very personal ideology of the legal services lawyers who are committed to poor communities and are less apt to sympathize with the opponents of their poor clients. There is some truth to that observation, but it is

176. Much of the legal profession falls in between the two ends which I contrast. Data shows that most lawyers practice in smaller firms or as sole practitioners. See BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S* 25 (1994). We can expect that many of these lawyers represent clients who are not very powerful, but who are charged fees. While my text discussion may not deal with this significant segment of the profession directly (by contrasting powerful clients and legal services clients), the arguments that I develop for "powerful" clients ought to apply whenever the lawyers charge a fee. The arguments developed for poverty law practice ought to apply whenever the lawyer's fees are not dependent on the client. The difference is the degree of dependency or vulnerability of the lawyer on the client's business. While smaller firms may represent considerably less powerful clients than large firms, their independence from their clients is certainly no less. Smaller firms and sole practitioners share the large firms' need for a continuous flow of business and the maintenance of an ongoing client base.

tempered by several realities that serve to reinforce the element of risk. One is that the standard conception provides legal services lawyers a protective argument *directed outward* toward critics of their zeal, and the activist conception undercuts that protection. A crude activist must respond, explicitly or internally, to critics who challenge his use of the law to help dangerous, unpopular, at times not-very-likable individuals. His traditional response relies heavily on his "role" in the standard conception, nonaccountability fashion. He might rely upon that excuse, even if he believed that his disrespected client was more worthy and deserving than his critics understood, as more palatable and acceptable than an argument on the merits. The erosion of the "adversary system excuse," whatever its benefits for lawyering generally, deprives legal services practitioners of that trumping argument against their more conservative detractors.¹⁷⁷

The other realization in response to the argument that poor clients are protected by the ideology of legal services lawyers is contextual. There is considerable evidence that poverty law practitioners experience some vulnerability toward, and tend to nurture relationships with, existing authority figures within their community.¹⁷⁸ These relationships can be expected to have some impact on the developed ideology of those lawyers. Thus, the concern about crude activism within poverty law settings remains considerable.

My second point is that refined activism in the poverty law setting might tend to conflate with the standard conception. I conceive of a refined activist as one who, perhaps like Linda, includes in her moral assessment the power and advantage of her clients relative to others. Such a lawyer takes into account the structural and political background of poverty, including elements of race, class, and gender.¹⁷⁹ That activist might then defend instrumental lawyering as presumptively morally justified with poor clients, maybe even in a strong way,¹⁸⁰

177. Consistent with the concern expressed in the text is the observation that legal services advocates have opposed developments within legal ethics which downplay instrumental lawyering in return for greater concern for substantive merit. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 708 n.184 (1989); GOLDMAN, *supra* note 19, at 125.

178. See, e.g., Tremblay, *Community-Based Ethic*, *supra* note 82, at 1107; JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 59 (1982).

179. For examples of those writing with reference to such contexts see Bezdek, *supra* note 105; Gilkerson, *supra* note 162; Handler, *Transformation of Aid*, *supra* note 160.

I do not mean to imply that a "refined activist" will be politically liberal, even if I am one who would lean that way. My distinction between levels of moral sophistication does not equate with differences along political lines. I use the example of a left-leaning activist to establish the resemblance between one version of that activism and the traditional conception.

180. Compare with Luban, *Mid-Course Corrections*, *supra* note 22, at 427-28 (describing

even if it is less justified otherwise. This is because of the inherent imbalances within the structural system favoring the opponents of the poor. David Luban has implied agreement with that reading of his version of morally activist lawyering, although his arguments assume a state or large bureaucracy opposing poor clients.¹⁸¹ One would need a broader exception to encompass matters such as the eviction of the Hunters by their not-too-powerful landlord. That exception would focus less on the size or power of the adversary and more on the wealth of the client. Analogous to criminal cases, zealous advocacy and neutral partisanship would then be justified for all poor client representation.

I am not persuaded that such a broad exception can be justified, although a refined activist perspective can support instrumental advocacy in individual cases, depending on the moral merits.¹⁸² But that question aside, there is a pedagogical curiosity that accompanies this second observation about the resemblance between activism and instrumentalism in poverty law settings. That curiosity concerns teaching activism within clinical programs. It appeared in the supervisor/student conversation about the Hunter case. If refined activism were indistinguishable from the standard conception in poverty law contexts, and if a poverty law context is the forum for teaching activist lawyering in a law school clinic, then it will not be easy to establish a "put-your-money-where-your-mouth-is" activism model with law students. Starkly (and exaggeratedly) put, it is only by betraying clients that one commits to activism. But betrayal is always painful. Unless it is modeled within the academy, it is hard to imagine it can be indoctrinated for later use when much more will be on the line for the then-student, now-lawyer. One could begin to teach real life activism by betraying real clients in a clinic, like the Hunters. Refined activism, though, may

the defeasible legitimacy of role obligations, but weakly so in civil cases because of the merely pragmatic value of the adversary system).

181. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 65 ("matters . . . between the powerless individual and the private megalith" ought to be exempted from his criticisms of excess zeal). See also Schneyer, *Hired Gun*, *supra* note 41, at 11, 20 (describing a David Luban speech in which Luban "advocated full-bore partisanship in any context in which one's adversary is 'a powerful bureaucratic institution that poses a chronic potential threat to individuals'"). In crafting an exception to his usual objections to instrumental lawyering, Luban, along with many others, follows his long-standing argument that criminal defense instrumentalism is more justified than that in the civil context. See LUBAN, *LAWYERS & JUSTICE*, *supra* note 6, at 58-63. For a recent colloquy on that question, see William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (challenging Luban's exemption); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993) (reply to Simon); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767 (1993) (rejoinder to Luban).

182. One might view Linda's approach to the Hunter litigation as such an example.

tend to protect clients like the Hunters. A potential pedagogical message is then lost.¹⁸³

Thus far I have described the refined activist as more understanding of the conditions of poverty than one employing a cruder view. She would, as a result, be more open to assist in questionable actions than she would deem justified with more powerful clients. There is, however, an alternative refined perspective, equally understanding and sympathetic, but less willing to be of assistance in the ways I have described, and less likely to defend a full zeal orientation for poor clients. This refined view adopts the "community-based" ethic of progressive practice I have described elsewhere.¹⁸⁴ That ethic suggests that poverty lawyers take into account the broader community of clients in their work. Actions which might favor a client here-and-now might be declined if those actions would have demonstrable unfavorable impact on other poor clients, either in the present or in the future.¹⁸⁵ This kind of activist would look at a case like the Hunters' and consider not only the harm to LeBlanc, and the legitimate, contextual circumstances of the Hunters, but also the long term interests of tenants in the local community, which would include the clinic's credibility as an advocate with the courts and other influential bureaucrats and officials.

Depending on how one reads the landscape, this alternative view

183. I need to respond to two likely objections at this point. First objection: The Hunter case was admittedly ambiguous; a clearer case of "bad tenants" could serve as a vehicle for activism in which even a refined view would not deign to support their efforts. This is plausible, but almost all cases within my clinic are *at least* ambiguous in the way the Hunter case is. There are no black hats on our clients—even the least likable have stories. Furthermore, the screening that occurs at all subsidized law offices would tend to keep out the truly meritless or repugnant cases. See Tremblay, *Community-Based Ethic*, *supra* note 82, at 1110-16.

Second objection: The "betray vs. support" dichotomy is too simplistic. There are more nuanced differences between a moral activist approach and a neutral partisanship approach than the "in/out" choice in the text implies; even considerations of how much moral dialogue to engage in about issues will be very different depending upon one's orientation. See, e.g., SHAFFER & COCHRAN, *supra* note 27, at 23-24 (criticizing certain versions of "moral dialogue"). This objection flows from correct premises, but is inadequate. The real nub of morally activist lawyering is making hard, finite choices when faced with moral tension. While one can learn a great deal about moral activism by the process of dialogue, if a refined view will tend to support the clients' goals, and if even in cases of disagreement the representation will proceed unchanged, that fact affects the message about the burdens and sacrifices triggered by the moral activist view.

184. Tremblay, *Community-Based Ethic*, *supra* note 82, at 1104, 1132-33 (proposing a standard by which legal services lawyers ought to assess their actions with reference to the needs of the local community of poor people).

185. *Id.* See also Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 959-68 (1992) (demonstrating how present client interests can conflict with long term interests of poor communities).

might be less accommodating of the Hunters' particular strategy of full-scale litigation in this case. A considered view *might* conclude that full zeal is indeed justified in this long-term perspective.¹⁸⁶ It might instead conclude, however, that the short-term gain to the Hunters comes at too great an expense to some later clients, who will benefit in the future from more compassionate clerks, judges, landlords, and landlord lawyers.¹⁸⁷

b) Simon's Justice-Driven "Purposivism"

This section considers the Simon perspective in comparison to that of Luban. The prior discussion of Luban's activism as applied to the Hunter case and Linda's and Christopher's deliberations demonstrated many of the risks and implications of activism generally. The question remains whether those risks and implications are altered in any way if our hypothetical lawyer were a Simon follower instead.

Simon's "purposivist" model offers different kinds of risks and different kinds of benefits. Recall that I have separated Simon's activist proposal into the purposivist and the justice-based versions.¹⁸⁸ At this point, we can see why that separation is needed. If Christopher has opted to follow a Simon approach rather than a Luban approach (having read both, let us assume, and having found the Simon arguments more persuasive), he would look at the Hunter case somewhat differently. Following Simon, he will look not to questions of ordinary morality, but to questions of legal merit. Employing Simon's formulations of purpose versus form¹⁸⁹ and substance versus procedure,¹⁹⁰ Christopher will likely view the two most technical strategies at his disposal as invalid. He could, we recall, assist his clients by litigating

186. See *supra* note 164 for one possible version of this argument.

187. This second, alternative version of refined activism is, on reflection, not necessarily "activist" at all. It is consistent, in fact, with a more complicated view of the traditional obligation. Recall that I use "activist" to refer to lawyering that is less instrumental, less client-focused, and more considerate of third party interests, while "traditional" refers to a strategy of maximizing client gain through all legal tactics regardless of the harm to other. Applying these definitions to the alternative view I have just outlined, we see that the community-based view can be *very* instrumental, and *very* client-maximizing, if "client" refers to the aggregate customer base of the poverty law office. There is nothing in the community-based view which demands attention to harms to landlords or to other third parties, except where doing so hurts poor clients. In this way the view need not be activist. It is, rather, a way of redefining the identity of one's client, and responding to the inevitable conflicts of interest that arise in subsidized poverty law practice. See Tremblay, *Community-Based Ethic*, *supra* note 82, at 1134.

188. See *supra* notes 73-97 and accompanying text.

189. Simon, *Ethical Discretion*, *supra* note 23, at 1102-03.

190. *Id.* at 1097-98.

both the invalidity of the notice to quit and the defect in the security deposit. Both were sent to the wrong address through the landlord's error. Christopher might properly conclude that while each serves as a technical, non-frivolous defense and/or counterclaim, neither serves the substantive purposes of the respective legislative schemes, which are meant to provide actual notice to the tenants in the first case and protection of the tenants' interest in the deposit in the second.¹⁹¹ Without elaborating on this point here, I think it is apparent that Christopher might properly apply the purposivist argument to conclude that neither tactic is permissible.¹⁹²

Because the purposivist version of moral activism focuses on apparent legal merit as presented through clear legislative intent, its teaching is, I believe, more easily applied than Luban's common morality standard. When one leaves the world of aneurysms, buried bodies, and innocent rape victims¹⁹³ and encounters morally ambiguous terrain like the Hunters' dispute, purposivism offers at least the pretense of a more manageable, shared set of evaluative criteria. I could be wrong, but my sense is that Christopher can more confidently conclude that substantive law does not contemplate the manipulateness that he might employ in this case than he can conclude that his moral vision ought to interfere with the interests of these tenants.¹⁹⁴ Purposivism permits him language he might use more comfortably with his clients and with his supervisor than the language of moral values. It also may be the case (and on this point I am considerably less sure) that Christopher can be *trusted more* to read the purpose of substantive law than to read common morality,¹⁹⁵ not inasmuch as his own life experience

191. As I have described the facts, in neither case have the tenants been harmed. They received the notice to quit on the same day it was left with the neighbor/friend. Christopher does not know whether the Hunters received the security deposit receipt; while it is likely that they did (since it went to their friend), Christopher might easily conclude that even their non-receipt of the notice is a harmless violation of the statute as long as LeBlanc can show that the funds were deposited in a protected account.

192. Simon's purposivist argument, of course, permits (and even suggests) instrumental use of technical rules if doing so is necessary to achieve the most meritorious result in a case. Simon, *Ethical Discretion*, *supra* note 23, at 1099. While some may disagree, Christopher can more than plausibly argue that this case is not one where he ought to use the technical tools to win an otherwise just claim. While it is true that the institutional process is quite imperfect, here that imperfection is not likely to lead to an improper result because Christopher can conclude that the Hunters have no "right" to stay in the apartment without paying rent.

193. See *supra* note 99-104 and accompanying text.

194. Rob Atkinson might argue that I am indeed wrong here. See Atkinson, *supra* note 25, at 889-906.

195. For support for this point see GOLDMAN, *supra* note 19, at 22-24; Pepper, *Counseling*, *supra* note 51, at 1579.

is concerned, but inasmuch as we expect him to use judgments to interfere with some wishes of others (here, the Hunters).

If purposivism is more manageable and perhaps more reliable, it is at the same time arguably more conservative in a case like the Hunters'. In other settings it might be more generous to poor clients than a Luban approach,¹⁹⁶ although one cannot be overly optimistic about the overall intentions of legislative enactments when it comes to the interests of poor people.¹⁹⁷ If one were to contrast the moral vision of legal services lawyers (using the Luban approach) with the substantive purposes of most state or federal legislation (discerned by lawyers using a purposivist approach), the former is apt to be somewhat more solicitous of the interests of the poor.¹⁹⁸ Neither activist model, of course, is as solicitous of those interests as is the traditional view, which permits all lawful tactics regardless of moral disagreement or legislative purpose.

Finally, what about the true Simon approach, which transcends purposivism with its eye toward "justice"? Christopher has read Simon, and understands that Simon is not suggesting simple purposivism, but instead supports an activism allowing nullification of seemingly legitimate governmental actions if they "were so plainly wrong and the values they affronted so fundamental that the lawyer should disregard the decisions."¹⁹⁹ In his deliberations about his role in the Hunters' case, Christopher may, following Simon, opt to litigate all of the vari-

196. The distinction between the two models will turn on whether legislative enactments are more or less solicitous to poor people than would be notions of common morality, or the moral vision of the lawyers involved in any given case. One area that might favor a purposivist orientation would be that of civil rights and antidiscrimination, where the legislative protection might be greater than many non-beneficiary citizens might support. An approach that relies upon one's sense of community morality might disadvantage civil rights plaintiffs, while a purposivist approach might encourage greater compliance with the statutes notwithstanding a lawyer's personal moral reactions to affirmative action or antidiscrimination laws. One need not accept my predictions of how different topics would play out to agree that the two standards, ordinary morality and legal merit, can lead to different lawyering choices.

197. See Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PENN. L. REV. 1277 (1993) (pointing out the dominance of moneyed interests in American politics); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (advocating public financing of elections to remedy strong influence of money in federal politics); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-44 (1991) (describing "interest group theory" of legislative action, which contends that legislators respond to pressures from organized interests); ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 77-83 (1983).

198. For a skeptical view of entrusting lawyers to make more morally informed choices generally, see Gutmann, *supra* note 148, at 1764-65.

199. Simon, *Ethical Discretion*, *supra* note 23, at 1115.

ous claims and act formalistically if in good faith he understands this course is best to vindicate the legal merits of this dispute.

I suspect that for most law students, and indeed for most lawyers, legal services or otherwise, the nullification standard described by Simon would have little impact on the tactics of the case I have described. While it is true that following the purposes of the applicable rules here will lead to forcible dispossession of the Hunters from their apartment, it would take a very creative view of American jurisprudence to argue that permitting a property owner to take that step in a case such as this contravenes "a core value of legality."²⁰⁰ Christopher will not feel constrained in this case by Simon's broader view; as a Simon adherent, he could easily justify a purposivist perspective which would argue against an instrumental use of these litigation tactics.

But Simon's broader thesis, even if not influential in Christopher's case, warrants some consideration in comparison to the first two we encountered. Two observations about the justice approach deserve mention. First, it is likely to be less reliable than either of the first two methods as a decision-making model. While the traditional approach offers predictability at the possible cost of moral corruption, the various activist approaches sacrifice some of that certainty for a gain in integrity. The increased lawyer discretion that accompanies the activist models presuppose some skill among lawyers in exercising such discretion in a meaningful way. Luban and Simon each argue that lawyers possess such skill. Luban relies upon common morality available to all persons,²⁰¹ and Simon on legal merit, which lawyers are assumed to be able to recognize by virtue of their legal expertise.²⁰²

Simon implies that the nullification function is simply another form of recognizing legal merit. If Simon is indeed making this claim, it is not persuasive. While his necessary assumption that lawyers possess judgment about legal merit in a purposivist way is controversial

200. *Id.* at 1116. Supreme Court decisions from the 19th century through recent terms have confirmed the centrality of private property rights in American jurisprudence. *See, e.g.,* *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235 (1897) (containing Justice Harlan's statement that "due protection of rights of property has been regarded as a vital principle of republican institutions"); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). *See generally* JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992).

201. Luban, *Partisanship, Betrayal and Autonomy*, *supra* note 22, at 1023-25.

202. Simon, *Ethical Discretion*, *supra* note 23, at 1119-23. *See also* SHAFFER & COCHRAN, *supra* note 27, at 38 ("Simon's justice is a recondite commodity. It is within the province of experts. . . . The lawyer makes the decisions, based not on moral superiority, but on technical superiority.").

but attractive, an extension of that argument to matters of nullification, of recognizing *in a reliable way* when laws applicable to one's client are not to be followed, is not at all self-evident. Where the common morality and purposivist standards are at least intuitively based upon a sense of shared commitments, the broader standard of legal merit is difficult to separate from one's deeper political standards. Indeed, Simon's example of this reasoning in his *Ethical Discretion* article seems only to prove this point.²⁰³

The second observation about Simon's broader view builds upon the first. If the nullification standard feels less constrained and predictable, it is also more attractive to poor clients. Consider: The broader Simon view says to a legal services lawyer, "You must not use the law instrumentally, but must only use it in a way that you can justify other than through the adversary system. You must, therefore, abide by the spirit of clear laws, even if you could take advantage of them, but you may ignore plain and unambiguous laws if you believe in good faith that the laws do not represent fundamental legal values of our culture." A good faith, activist lawyer practicing within these constraints has more choices than one who acts according to the purposivist standard. The advantage for poor clients, of course, is a similar advantage for wealthy clients whose lawyers have the same instructions. The risk, then, is that a generous view of the broad Simon perspective collapses into a traditional model, in that it constrains lawyer manipulation less than either of the first two activist models.

3) Acting According to the Activist View

The final consideration has to be "what happens next?" The discussion up to now has helped clarify how Christopher chooses among the activist approaches and whether under any chosen standard the case

203. Simon relies upon *Goldberg v. Kelly*, 397 U.S. 254 (1970) and some commentary upon that case to argue that "welfare interests [have] sufficient weight to generate a presumption against interpretation of legislative norms that would impair them." Simon, *Ethical Discretion*, *supra* note 23, at 1106-07 n.55. However much one would hope he were correct, it seems a quite inflated claim to assert that minimum subsistence constitutes a fundamental constitutional principle today. While we do not need to discourage such an optimistic reading of available precedent for purposes of advocacy or scholarship, Simon's goals are much more worrisome. Simon suggests that lawyers take actions that are *contrary to client wishes and goals* based upon such this kind of reading of prevailing jurisprudence. It is one thing to refuse to collaborate with a client trying to exploit technical advantages which contravene non-controversial legal purposes (what I have labeled Simon's "purposivism"). It is quite another to interfere with client goals based upon a strained and wishful reading of legal values, as I see Simon proposing under his broader recommendations.

calls for something other than ordinary lawyering. Let us assume that it does. At this point it does not matter under which version activism has been triggered. We need only recognize that Christopher has concluded that using the eviction procedure instrumentally is unacceptable to him.

There is not sufficient space to explore Christopher's range of choices in any great detail, but I do want to consider a couple of questions regarding the *lawfulness* of Christopher's options. Christopher does not live in some future morally superior world. He practices in Massachusetts in 1995, with whatever limits and mandates the professional responsibility laws of that state might impose upon him. Do those mandates *permit* him to be as morally activist as he might believe he ought to be? *Can* he act in the way that his teachers and the philosophers are suggesting he act?

There are, it seems, two ways to approach these questions, a simple way and a complicated way. The simple response offers two suggestions for Christopher, neither of which causes him any risk of professional censure. He may of course *talk* to his clients about his moral or legal concerns, and hope to come to an accommodation between what he perceives as their less-than-principled instructions and his moral or legal limitations. As many have pointed out, we too often assume that our clients would be unwilling to consider the moral implications of their choices.²⁰⁴ I do not want at all to belittle the importance of this process, but it is not an "activist" one; it is fully permitted, perhaps encouraged, by the traditional rules.²⁰⁵ I therefore need not address it fully here. The second "simple" choice is to withdraw, if the moral dialogue does not accomplish a satisfactory accommodation of Christopher's concerns. Withdrawal is "activist." Depending on one's jurisdiction and the prevailing interpretation of norms, it is probably allowed. I call it "simple" because one can readily find out whether it is permitted within the jurisdiction, even though it is never easily chosen by a lawyer.

Christopher might try, though, to practice morally activist lawyering in a more subtle way. For instance he might: (1) not file the motion to dismiss based upon the faulty notice to quit, (2) not plead a security deposit counterclaim, or (3) not serve discovery if he thinks that, while not frivolous, doing so is purely instrumental and not justified under the standards he has chosen to follow. This, to me, is activism in an affirmative sense. It limits the scope of the representation

204. See SHAFFER & COCHRAN, *supra* note 27, at 37; Gutmann, *supra* note 148, at 1764.

205. Margulies, *Interests of Nonclients*, *supra* note 25, at 223-27.

without withdrawing, and without informing the clients about the availability of the unchosen tactics.²⁰⁶ Christopher could simply diminish the range of available options that an ethical lawyer might consider, excluding those which he deems not fitting that definition. Just as Christopher would not include perjury as a choice he would discuss with his clients, as a moral activist he might leave the instrumental ploys off the table.

This latter strategy is what I refer to as the complicated one, for reasons that should be apparent. The complicated practice is more consistent with an activist orientation, and truer to its mission than is a practice in which withdrawal is the only remedy available for clients who choose the instrumental route. It is probably not lawful, however, as I read existing standards, and it may well constitute malpractice.²⁰⁷

206. I include the failure to counsel the clients as an element of this activist strategy, but of course one could commit to not using tactics and talk to the clients about the reasons for that commitment. I choose a more "betraying" stance for a couple of reasons. First, it tests activism with a more stark proposal, which serves some of my exploratory needs. Second, I can justify favoring my choice. If to Christopher the instrumental option is equivalent to perjury (sure, one is legal and the other not, but an activist could say that distinction is of no concern), then discussing it only to explain why he is not using it is an odd choice. That tactic elevates the choice higher than Christopher might value it. I have argued in a separate context that a lawyer's betraying his client's confidences without first informing the client of that intention is ethically unjustified. Paul R. Tremblay, "Ratting," 17 AM. J. TRIAL ADVOC. 49, 85-87 (1993). That argument seems inconsistent with my position here, which acknowledges that activist lawyers might withhold from clients legally available but morally unacceptable options. I do think there are critical differences between the active betrayals I considered in that earlier article, and the limitations on advocacy I describe here. My 1993 article objected to lawyers implying a promise of confidentiality and then revealing client information to police. I expressed concern about the resulting risk to the expectations of trust within the professional relationship. *Id.* at 87-99. By comparison, far less systemic or professional harm results if lawyers do not offer to engage in tactics the lawyers find morally repugnant if the client is not aware that the tactics are available.

207. The elements of a legal malpractice claim are fourfold: duty; breach of duty; causation; and harm. HAZARD ET AL., *supra* note 13, at 175-76; *see also* Fishman v. Brooks, 487 N.E.2d 1377 (Mass. 1986); David A. Barry, *Legal Malpractice in Massachusetts*, 63 MASS. L. REV. 15 (1978). Had Christopher opted not to raise the counterclaims or not to conduct discovery, he would have breached his duty to the Hunters, if such a breach is defined as "[a] failure by a lawyer to exercise the care, skill or diligence that reasonably competent lawyers exercise under similar circumstances." HAZARD ET AL., *supra* note 13, at 175. While the "standard of care" question in legal services practice might be more complicated than with paying clients, because overworked lawyers in that setting so often cut corners (*see* Bellow, *supra* note 134), my anecdotal sense is that it is the customary practice of legal aid lawyers faced with evictions in Massachusetts to file discovery requests to leverage the extra two weeks of the tenants' possession, and always file available counterclaims, especially since doing so is simple. Indeed, it is because poverty lawyers are generally quite instrumental and technical in their use of these devices—because of the ability of these techniques to level the playing field of the respective litigants—that the standard of care is likely not to comport with Christopher's activist plans.

While one might predict that a malpractice liability judgment would be very unlikely in a case such as the one I have chosen to observe,²⁰⁸ an activist lawyer in the private market who costs a client substantial sums of money by failing to employ instrumental procedural devices cannot feel so confident.²⁰⁹

If I am correct about this supposition, that activism is only lawful in the simpler but not in the more complicated fashions, that realization is a bit sobering for proponents of the activist position. It does not diminish the force of the activist message that lawyers cannot avoid responsibility for their actions, a message which (as it becomes more widespread) will consequently call for increased dialogue and more trepidation about instrumental, loophole lawyering. But one senses that the tremendous intricacy of the scholarly debate about the scope and the limits of various kinds of activism has presupposed that activists would be able to accomplish more, in actual practice alongside clients, than what they have always had permission, if perhaps considerably less incentive, to do.

V. CONCLUSION

This Article, like so much of clinical scholarship, seeks to begin an inquiry that deserves much more investigation. My points have been few. I have tried to show that the sophisticated philosophers' struggle to articulate models of morally activist lawyering must inform those of us who practice and who teach practice. At the same time, however, we must be modest and realistic about how much of that debate will in fact translate into attitudinal or behavioral changes among ordinary lawyers. What we need, and this is most apt to come from clinical faculty within law schools, is a set of models or protocols by which one might try to use a morally activist approach with clients.

Whether these tenants would have suffered "harm" by a decision by Christopher to forego counterclaims or discovery is a much more complex question. The chances of winning possession in this case was infinitesimal; while the chances of reducing the potential judgment was perhaps greater, for the Hunters (and many poor tenants) a large judgment is of equal irrelevance as a small judgment, at least in any realistic financial sense. Their real harm would have been in the negotiating leverage and in their loss of the chances to extend the proceedings to gain valuable time.

208. Not only are legal services clients unlikely to sue because of a lack of access to counsel, but in addition, if such a case were brought, one could safely predict that most judges or juries would be unsympathetic to the arguments of the tenants in a case where the lawyer opted not to act instrumentally.

209. See Bundy & Elhauge, *supra* note 40, at 322 ("[l]awyers who otherwise would deny advice to clients on ethical grounds will not persist when threatened with malpractice liability").

I have tried to experiment with variations on three protocols here. That experiment suggests that our protocols must anticipate how reliably a lawyer might interpret the standards driving the activist stance. For each criterion we might use (ordinary morality, or purposivism, or justice), we encounter different kinds of risks and advantages. It will not be the philosophers, of course, who decide whether a certain action is morally justified, or apt to achieve legal merit, or is just in a broader sense. It will be lawyers doing so. To achieve a good faith and workable activist model, and one which is less subject to the persuasions of self-interest, one must search for such standards that these lawyers might comfortably recognize and accept as constraints on their practice. I am not sure that the philosophers have progressed very far in that direction yet. Finally, practicing clinical teachers must understand exactly what morally activist lawyering means in terms of the particular behaviors current law actually permits. This consideration is frequently overlooked in the literature. It is among the first questions asked by students who want to work with these intriguing ideas, however. We owe it to them to have reasonably concrete answers.